

**TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1922**

**No. 225**

**WABASH RAILWAY COMPANY, PETITIONER,**

**vs.**

**MILES ELLIOTT.**

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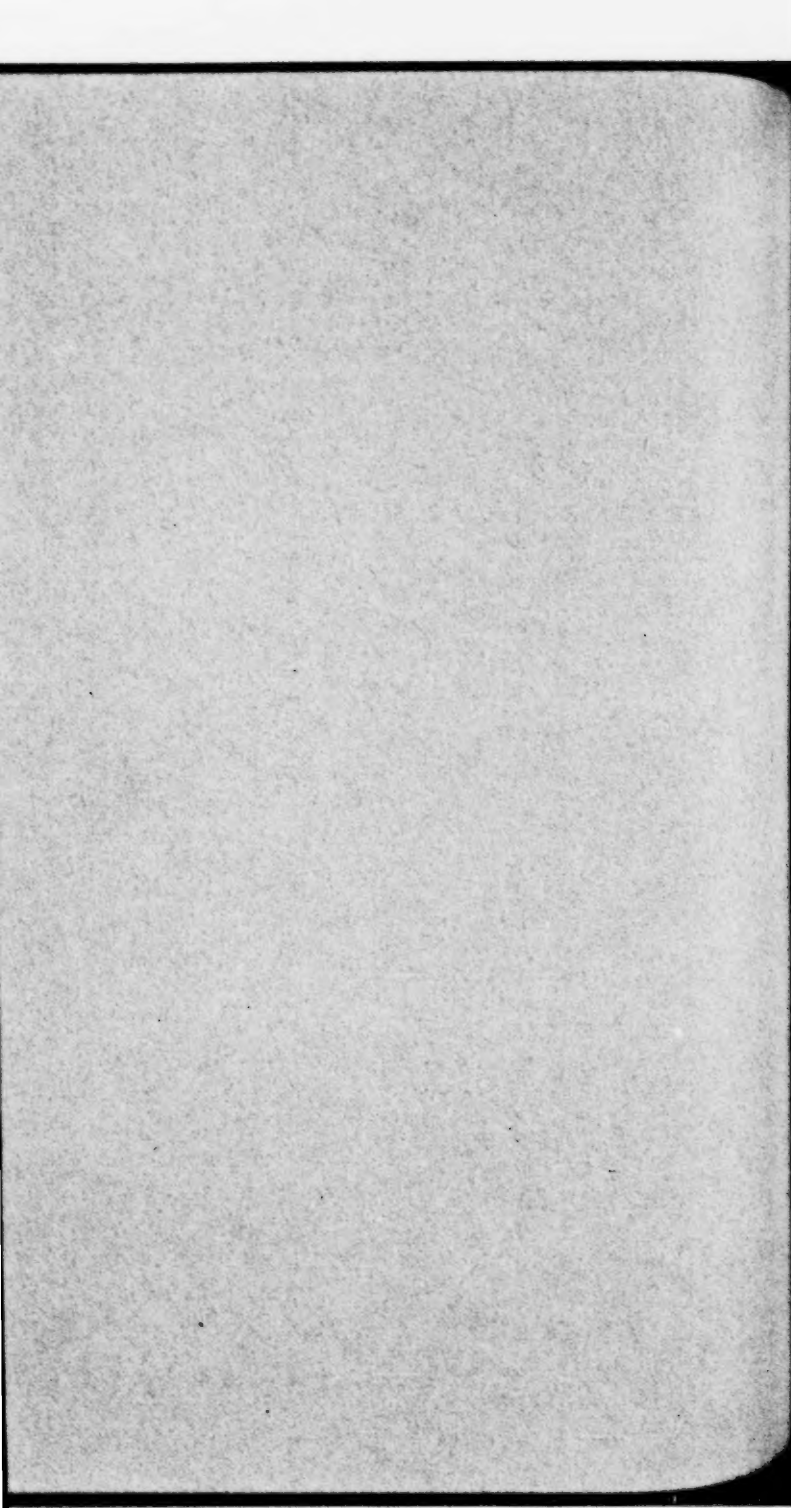
**ON WRIT OF CERTIORARI TO THE KANSAS CITY COURT OF  
APPEALS, STATE OF MISSOURI.**

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**PETITION FOR CERTIORARI FILED DECEMBER 13, 1921.**

**CERTIORARI AND RETURN FILED FEBRUARY 24, 1922.**

**(28,603)**



(28,603)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 648.

WABASH RAILWAY COMPANY, PETITIONER,

*vs.*

MILES ELLIOTT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF MISSOURI.

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STATE OF MISSOURI, *set*:

In the Kansas City Court of Appeals.

Be it remembered, that heretofore, to-wit, on the 28th day of February, 1920, there was filed in the office of the Clerk of the Kansas City Court of Appeals, a transcript of appeal, wherein Bessie G. Welker, Administratrix of the Estate of Mern G. Welker, deceased, was Plaintiff, Miles Elliott, Movent and Petitioner was Respondent, and Wabash Railway Company was Appellant, which said transcript of appeal is in words and figures as follows, to-wit:

"Be it remembered that on the 3rd day of the regular January Term, 1920, of the Circuit Court of Livingston County, Missouri, the same being the 7th day of January, 1920, the following proceedings were had and made of record, to-wit:

BESSIE G. WELKER, Administratrix of the Estate of Mern G. Welker,  
Deceased, Plaintiff,

VS.

WABASH RAILWAY COMPANY and WALKER D. HINES, United States  
Director General of Railroads, Defendants; Miles Elliott, Movent  
and Petitioner.

Now at this day this cause coming on to be heard on amended motion of Miles Elliott, Movent and Petitioner to enforce attorney's lien, comes Miles Elliott, Movent and Petitioner, in person and by his Attorney and Defendants by their Attorneys and cause is submitted to the Court, evidence heard and taken under advisement.

Afterwards, to-wit, upon the 16th day of the same term of said court the same being the 30th day of January, 1920, the following other proceedings were had and made of record in this cause to-wit:

BESSIE G. WELKER, Administratrix of the Estate of Mern G.  
Welker, Deceased, Plaintiff,

VS.

WABASH RAILWAY COMPANY and WALKER D. HINES, United States  
Director General of Railroads, Defendants; Miles Elliott, Movent  
and Petitioner.

Now at this day this cause coming on for final hearing and determination by the Court, the Court having heretofore heard the evidence herein and being now fully and sufficiently advised in the premises, doth find the issues herein in favor of Miles Elliott, Movent and Petitioner and against Defendant, Wabash Railway Com-

pany, in the sum of Four Thousand One Hundred Sixty-two Dollars and Eighty-five Cents.

It is therefore ordered and adjudged by the Court that Miles Elliott, Movant and Petitioner, have and recover of Defendant, Wabash Railway Company, the said sum of Four Thousand One Hundred Sixty-two Dollars and Eighty-five Cents (\$4,162.85), with interest from this 30th day of January, 1920, at the rate of six per cent per annum, together with his costs in this behalf expended and the execution issue therefor; and the Court doth find the issues in favor of Defendant, Walker D. Hines, United States Director General of Railroads and that he go hence and recover of Miles Elliott, Movant and Petitioner, his costs in this behalf expended and that execution issue therefor.

Afterwards, to-wit, upon the same day of said term of said court the following other proceedings were had and made of record in this cause, to-wit:

BESSIE G. WELKER, Administratrix of the Estate of Mern G. Welker  
Deceased, Plaintiff,

vs.

WABASH RAILWAY COMPANY and WALKER D. HINES, United States  
Director General of Railroads, Defendants; Miles Elliott, Movant and Petitioner.

3 Comes now defendant, Wabash Railway Company and its  
affidavit and application in appeal praying an appeal to the  
Kansas City Court of Appeals and said defendant's appeal bond is  
the Court fixed at the sum of Eight Thousand and Four Hundred  
Dollars, to be given within ten days after the adjournment of the  
term of this court to be approved by the Clerk in vacation and said  
defendant is granted until on or before the last day of the next term  
of this court in which to file bill of exceptions herein and said  
defendant's affidavit and application in appeal is taken up and being  
found to be sufficient and in due form of law an appeal is hereby  
granted to the Kansas City Court of Appeals of the State of Missouri.

STATE OF MISSOURI,  
*County of Livingston, ss:*

I, Byrd L. Hamblin, Clerk of the Circuit Court within and for  
the County in the State aforesaid, do hereby certify that the above  
and foregoing is a true copy of the judgment and order granting an  
appeal in the foregoing cause as the same appears of record in my  
office.

Witness my hand and seal of said Court at office in Chillicothe  
this 25th day of February, 1920.

BYRD L. HAMBLIN,  
*Circuit Clerk.*

And thereafter, to-wit, on April 2, 1921, the appellant, Wabash Railway Company, filed in this Court its printed abstract of the record, copy of which is hereto attached and made a part hereof.

4 And thereafter, to-wit, on May 23, 1921, the court entered of record its judgment in said cause, in words and figures as follows, to-wit:

BESSIE G. WELKER, Administratrix of the Estate of Mern G. Welker,  
Deceased, Plaintiff.

vs.

WABASH RAILWAY COMPANY, Appellant; MILES ELLIOTT, Movant  
and Petitioner, Respondent.

Appeal from Livingston Circuit Court.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Livingston County rendered, be in all things affirmed, and stand in full force and effect. It is further considered and adjudged by the Court that the said respondent recover against the said appellant costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

5 In the Kansas City Court of Appeals, March Term, 1921.

No. 13826.

MILES ELLIOTT, Movant and Petitioner, Respondent; BESSIE G. Welker, Administratrix of the Estate of Mern G. Welker, Deceased, Plaintiff.

vs.

WABASH RAILWAY COMPANY, Defendant, Appellant; WALKER D. HINES, United States Director General of Railroads, Defendant.

Appeal from Livingston Circuit Court.

This is a suit under the attorney's lien act.

The facts show that on April 2, 1918, while the defendant railway company was in the charge of the federal government and was being operated by the Director General of Railroads, Mern G. Welker, while employed as a brakeman upon the railroad, was killed at Shenandoah, Iowa. At the time of his death he was a resident of Shelby County, Missouri. Letters of Administration on his estate were granted to his wife, Bessie G. Welker, by the probate court of Shelby

county. On May 18, 1918, said Bessie G. Welker as Administratrix entered into a contract with Miles Elliott of Chillicothe, Missouri, an attorney at law who in the printed record is designated as moving and employing said Elliott as her attorney to represent her to "investigate, settled, adjust, compromise or bring suit upon her claim against the Wabash Railway Company on account of the death of her said husband," and agreeing to pay him "fifty per cent of all money received upon the above claim or cause of action, whether by suit, compromise or settlement." After the execution of said contract Mr.

6 Elliott drew up a written notice of his attorney's lien and placed it in the hands of the sheriff of Livingston county for service. It was addressed to the Wabash Railway Company,

a corporation, reciting the substance of his contract with Mrs. Welker. This notice was dated May 23, 1918, and was served by the sheriff on the 24th day of May, 1918, his return reciting that he left a copy of the notice at the business office of the railway company with W. R. Stepp, the agent and person in charge of said office, etc.

On June 5, 1918, Elliott filed suit in the Circuit Court of Livingston County to recover damages on account of the death of said Mrs. G. Welker, in which suit Bessie G. Welker, administratrix of the estate of Mern G. Welker, deceased, was plaintiff and the Wabash Railway Company, a corporation, was defendant. At the January term, 1919, in the Circuit Court of Livingston County a stipulation was filed in said cause for the dismissal of the same, signed by plaintiff and the Wabash Railway Company by C. G. Williamson, its counsel and reciting that the subject matter of the cause had been fully settled and stipulating that the suit should be dismissed at defendant's costs.

A few days after the filing of this stipulation and before suit was dismissed Elliott filed in the cause a motion entitled "motion to enforce attorney's lien." At the April term of said court, said Elliott upon leave of court, filed an "amended motion to enforce attorney's lien," making Walker D. Hines, Director General of Railroads, as well as the Wabash Railway Company, defendant. The amended motion alleged that at all the times mentioned in said motion the "Wabash Railway Company and its railway was to some extent and degree under the administration and control of the United States Railway Administration and of the United States Director General of Railroads," under the "Federal Control Act" and proclamation of the President; that under General Order No. 50 the Director General of Railroads ordered that he be made a party to all suits against railroads, and "that the action herein is such a suit;" that Mern G.

7 Welker, was the employe of both defendants and was killed by their negligence. Said motion further recited the granting of Letters of Administration to Bessie G. Welker, the contract between the latter and Elliott, the notice served upon the Wabash Railway Company and that the agent upon whom such notice was served was agent of the Director General of Railroads as well as of the Wabash Railway Company. It further alleged that defendants with full knowledge of the terms and provisions of said contract and without the knowledge or consent of Elliott, made a settlement with

said administratrix and in pursuance thereof paid her the sum of \$1,000.00 together with \$162.85 for funeral and burial expenses of the deceased; that "your movent and petitioner has a lien upon the cause of action in the said cause in the amount of Four Thousand One Hundred Sixty-two and 85/100 Dollars, and that to permit the dismissal of this cause under said alleged agreement for dismissal and to enter judgment of dismissal thereunder would wrongfully and illegally deforce movent and petitioner of his said lien" and prayed judgment in said sum mentioned.

The separate answer of the railway company is: First, a plea in abatement and to the jurisdiction of the court over said defendant, alleging that at the time of the death of the deceased said railway company did not operate, control or manage and was not in possession of the property, railroad rights and franchises of the Wabash Railway Company and that such were in the possession of the federal government under the control, management and operation of the Director General of Railroads; that defendant did not have or maintain an office or place of business in Chillicothe, Livingston County, Missouri, in charge of an agent upon whom process could be served; that the process served in the cause was not served upon an agent of said defendant. It further alleged that the court had no jurisdiction over the cause for the reason that under the orders of the Director General of Railroads suits or causes of action of this character should be brought at the place where the cause of action accrued or where the plaintiff resided; that under General

Order No. 50 of the Director General of Railroads the suit should have been brought against the Director General of Railroads and not against the Wabash Railway Company, and "that process was issued against this defendant in violation of said order." The answer also contains a plea to the merits, denying that any person authorized to represent it had made a settlement with the administratrix and that it had paid any money in any such sum. It further denied that it had any notice of knowledge of any contract existing between plaintiff and Elliott or that such notice was served on any agent or employee of the defendant.

The separate answer of the Director General of Railroads, Walker D. Hines, is first a plea in abatement and to the jurisdiction of the court, alleging that at all times mentioned in the petition of the administratrix and in the motion of Elliott, the property, rights and franchises of the Wabash Railway Company were in the sole possession and under the control of the federal government and not under the control, operation and management of the Wabash Railway Company; that under General Order No. 50 of the Director General of Railroads said Director General was in sole possession, management and control of the property of the defendant Wabash Railway Company; that process was issued against the Wabash Railway Company as sole defendant in the original cause of said administratrix against said company; that the return of said process in said cause shows that the only defendant attempted to be served was the Wabash Railway Company; that no process whatever was ever issued against Hines Director General of Railroads or his predecessor in

office; that suit was not brought where the cause of action arose at the residence of plaintiff, contrary to the orders promulgated by authority of law. Said answer by way of a plea to the merits denies that any process was ever issued or served against the Director General of Railroads or that he had any knowledge of any contract existing between Elliott and the administratrix. The answer further contained a general denial. The reply was a general denial. There was a trial before the court resulting in judgment in favor of Elliott and against the Wabash Railway Company in the sum of \$4,162.85 and costs, and in favor of the Director General of Railroads. Defendant, Wabash Railway Company, has appealed.

Appellant contends that there is no authority under the attorney's lien statutes, Sections 690, 691, R. S. 1919, for a proceeding to enforce an attorney's lien by motion in the original cause where the settlement complained of is made before judgment, citing among other cases the case of *Mills v. Met.*, 221 S. W. 1. Respondent admits that if this suit were based on section 690 of the attorney's lien statute, the contention would be well taken but contends that he has a right to proceed by motion in the original cause where the proceeding is based on section 691. We do not find it necessary to pass upon these contentions for the reason that the situation in the case appears to be the same as that in the *Mills* case. While the record designates this proceeding as a motion to enforce attorney's lien and the motion is filed in the cause of *Bessie G. Welker*, administratrix of the estate of *Mern G. Welker*, deceased, against the Wabash Railway Company, and while such designation might indicate that it was a proceeding in the original case, an understanding of all the facts in the proceeding would indicate otherwise. The first pleading in the present proceeding alleges every fact necessary to a statement of an independent cause of action against the defendant Wabash Railway Company in an action at law for the enforcement of Elliott's lien, and prays judgment against said defendant for the amount thereof. Appellant makes no point that it was not served in this proceeding as in an ordinary action nor did it object in the lower court to the form of the proceeding but assumed that it was regular in this respect and filed its plea in abatement and

the merits. To this answer Elliott filed a reply consisting of a general denial. A trial was had upon the issues thus joined and evidence was received on behalf of all the parties, declarations of law and findings of fact were requested by such parties, and the case was submitted to the court and judgment rendered, all in conformity with the rules and practices observed in civil actions in this state. The case was tried upon the theory that this proceeding was regular. The judgment rendered was a money judgment against the defendant and nothing more. As before stated, the facts in reference to this matter were not essentially different from those that appeared in the *Mills* case and under the holdings in the case defendant's point is not well taken.

Whether Elliott could by his amended motion make the Director General of Railroads a party defendant jointly with the Wabash

Railway Company, is a question that is not before us for decision. There was no question raised in the trial court as to an improper joinder of parties defendant and the Director General of Railroads has not appealed.

It is contended that the Circuit Court of Livingston County had no jurisdiction over the Wabash Railway Company in this case under the provisions of the Act of March 31, 1918 (Sections 3115-3116-3117-3118, U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919). In this connection it is insisted that in view of the fact that the Wabash Railway Company was in charge of and under the control of the federal government and being operated through the Director General of Railroads, the deceased was an employee of the Director General of Railroads and was not in the employ of the defendant railway company, and in view of the fact that General Order No. 50 of the Director General of Railroads providing that suits of this nature should be brought against the Director General and not otherwise, that the original suit herein was not only improperly brought against the Wabash Railway Company but could not be maintained against the same nor could Elliott's suit to recover his attorney's fees, and that it follows that the service of the notice of Elliott's contract on Stepp, station agent of the Wabash Railway Company, was not notice to the Wabash Railway Company, Stepp being an employee of the Director General and not of the Wabash Railway Company, and that service of the original summons in the suit of the administratrix upon Stepp was void and did not confer any jurisdiction upon the court over the defendant. Pertinent parts of General Order No. 50, promulgated October 28, 1918, reads as follows:

"Whereas since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporations:

It is therefore ordered, that actions at law, suit in equity and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage of property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures."

The summons in the original cause was executed by the sheriff and in his return he recites that he executed the summons by leaving a copy of the writ and a copy of the petition thereto attached with W. R. Stepp, agent of the defendant, Wabash Railway Company, at the office of the defendant in Chillicothe, Livingston County, Missouri, said Stepp being the agent and person in charge of the business office of the defendant in Chillicothe, the president or other chief officer not being found in the county. Even though the return of the sheriff showing service of summons on the defendant was false, it is conclusive upon the parties to the suit and the privies and can only be controverted in a direct attack upon

12 it in an action against the sheriff for false return. (*Sum-*  
v. Judd, 184 Mo. 508, 518; *Vicksburg, S. & P. Rd. Co. v. Anderson-Tully Co.* 261 Fed. 741, 744.) There is nothing in the Act of Congress or the orders of the Director General of Railroads to indicate that the Wabash Railway Company as a corporation was not in existence or that its entity as a corporation was suspended even after its business and the operation of its railroad was taken over by the federal government (*Hines v. Dahn*, 267 Fed. 105, 109, 110) and it is not impossible that said corporation might have had an agent in Chillicothe upon whom summons could have been served or might have maintained in its employ the usual officers and attorneys. (*Hite v. St. Joseph & G. I. Ry. Co.*, 225 S. W. 916, 92; *Vicksburg, S. & P. R. Co. v. Anderson-Tully Co.*, *supra*.) Of course we do not mean to say that the fact that the railway might have been sued would make it liable for the acts of the Director General of Railroads, that was a matter of defense and did not go to the jurisdiction of the Court.

There was evidence tending to show that one Williamson, who was a claim agent and attorney employed by both the Director General and the Wabash Railway Company, made the settlement with the administratrix. The contract of settlement was in the form of release and recited that the money was paid by the Director General. However, the voucher for the money was signed by "Wabash R. & Federal Account." The release stipulates that both the Director General and the railway company were released. Williamson, attorney for the Wabash filed a stipulation in the original cause of *Bessie G. Welker, Administratrix of the Estate of Mern G. Welker deceased, v. Wabash Railway Company*, reciting that the subject matter of the suit had been fully settled and stipulating that the suit should be dismissed at defendant's costs. This stipulation for dismissal was signed by the Wabash Railway Company by Williamson as counsel. The evidence shows that Williamson before he settled with the administratrix knew of Elliott's contract with her. At the settlement was made after suit was brought no notice of Elliott's lien was required. (*Taylor v. Rd.*, 207 Mo. 495.) Appellant is in no position to say that it did not make settlement with the administratrix in view of the fact that it accepted its benefits by filing the stipulation of dismissal. (*Wilson v. St. Joseph & G. I. Ry. Co.*, 211 S. W. 897; *Reed v. John Gill & Sons Co.*, 201 Mo. App. 457, 459.)

In reference to the contention that under Federal Order No. 50 of the Director General of Railroads, the original suit of the administratrix against the Wabash Railway Company was improperly brought against the railway company instead of against the Director General. There is much conflict of authority as to whether said order is effective to require suits to be brought against the Director General, some cases holding that they must be brought in that manner on the ground that the railway company cannot be held liable for the acts or neglect of his servants and agents but not on the ground that the Director General can deprive the courts of jurisdiction to determine whether the railway company in suits against it can be held for the acts or neglect of the servants and agents of the Director General. In other words, the question of whether the railway company or the Director General can be used for the acts and conduct of the latter's servants and agents is not a jurisdictional question, but the courts still retain jurisdiction to try such a suit on the merits and to determine if the Federal Control Act, together with General Order No. 50, is or is not a matter in bar to the merits of the action. In this connection it will be noted that the reason assigned in General Order No. 50 for its issuance was that—

" \* \* \* suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible."

The order in effect declares "Carriers" not responsible for the conduct of the Director General and his agents. We will hereafter point out that the Director General has no right to issue orders limiting the jurisdiction of the courts. The courts still may lawfully issue 14 and have served process to bring the railway company into court even though the petition bases the cause of action on the negligence of the servants of the Director General. However, there are many cases holding that the federal statute *supra* provides for the suing of the carrier corporation itself. The cases *pro* and *con* are collated in the case of *Hines v. Dahn*, *supra*.

As before stated, there is nothing in the federal statute or order of the Director General of Railroads preventing or assuming to prevent the suing of the carrier as a corporation. The order does not prevent its suing or the being sued. The supreme court of this state in the case of *Hite v. St. Joseph & G. I. Ry. Co.*, *supra*, held that the federal statute *supra* provides for the operation of railroads by the companies themselves but under federal control, and that an employee could maintain an action against the railroad company even though at the time of his injury the railroad was under federal control. This suit was brought before the promulgation of General Order No. 50 and we do not know what the supreme court of this state would hold in a case brought after October 28, 1918.

However, we find it unnecessary to go into the question as to whether a recovery can be had against the railway corporation for the acts of the Director General in view of the Federal Control Act

and his order No. 50, as the facts in this case show that the administratrix had at least a bona fide dispute or doubtful claim against the railway company as such. This is shown by the fact that the courts themselves do not fully agree as to whether the suit may or may not be successfully prosecuted against the railway company instead of the Director General of Railroads. There is no contention that the administratrix did not have a good cause of action from

the standpoint of negligent conduct of one or the other, nor is there any question but that the claim was asserted in good faith. These facts together with the further fact that a suit was pending at the time of the compromise show that there was sufficient consideration for the settlement. (12 C. J. pp. 324, 325, 327; *Livingston v. Dugan*, 20 Mo. 102; *Wood v. Telephone Co.*, 22 Mo. 537, 565.) There was not only sufficient consideration for the settlement but the amount of money under the agreement to settle was actually paid and received by the administratrix. In view of all of these facts it is not incumbent upon Elliott, in order to recover to show that the claim was a valid one in the sense that claimant is able to recover on it. (12 C. J. pp. 329, 330.) This renders it unnecessary for us to hold that the railway company is estopped to claim lack of consideration for the settlement by its conduct in accepting the fruits thereof after the amount of the settlement was paid the administratrix. From what we have said we think there is no question but that Elliott is entitled to recover and that the court did not err in giving Elliott's declarations of law Nos. 3, 4, & 7 and in refusing defendant's declarations of law Nos. 4, 5, 6, 7, 9, and 13.

It is insisted that if Elliott was entitled to recover, his recovery should be for only fifty per cent of the amount actually paid in settlement of the claim, that is, fifty per cent of \$4,162.85, and for that reason the court erred in giving his declaration No. 2 and refusing defendant's declaration No. 3. There was evidence tending to show that Williamson said to the administratrix, in making the settlement, that the part he paid to her was hers, to put the money in the bank, to use the money as her own, and that she would not have to divide the money with her lawyers. While there was some evidence contradicting this, the finding of the trial court, sitting as a jury, on this conflict in the evidence is conclusive on us. (*Mytton v. Mo. Pac. Ry. Co.*, 211 S. W. 111.) In view of this evidence

the amount of settlement was not the amount of money actually paid the administratrix but the agreement was that the amount paid to the administratrix was only her part under the attorney's contract and not the attorney's portion. As under the contract she had with Elliott her share was to be only fifty per cent of the whole sum, the total settlement was for twice the amount she received. Therefore Elliott was entitled to recover one-half of the whole settlement which is a sum equal to that paid his client. (*Mytton v. N. Y. Central & St. L. Rd. Co.*, 198 S. W. 189; *Mytton v. Mo. Pac. Ry. Co.*, supra; *Kaemmerer v. St. Louis Elec. Ry. Co.*, 211 S. W. 687; *Boyd v. Chase & Sons Mercantile Co.*, 135 Mo. App. 115; *Curtis v. Met.*, 125 Mo. App. 369; *Curtis v. Met.*, 118 Mo. App. 341.)

It is insisted that by reason of General Order- Nos. 18 and 18-a, promulgated by the Director General of Railroads, providing that suits against carriers must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose, the circuit court of Livingston County had no jurisdiction as the plaintiff resided in Shelby County and the cause of action arose in Iowa. The venue in transitory causes of action provided by the laws of the state could not be modified or limited by orders of the Director General as was attempted in General Orders 18 and 18-a. (State v. Calhoun, 220 S. W. 6; Haubert v. Baltimore & Ohio Rd. Co., 259 Fed. 361, 363; Moore v. Atchison, T. & S. F. Ry. Co., 174 N. Y. Supp. 60; Illinois Central R. Co. v. Ryan, 214 S. W. 642; El Paso & S. W. Rd. Co. v. Lovick, 210 S. W. 283; Pullman Co. v. Uribe, 225 S. W. 189; Young v. Hines, decided by this court but not yet reported.

The judgment is affirmed. All concur.

EWING C. BLAND.

17 And thereafter, to-wit, on the 31st day of May, 1921, the said appellant filed in this Court its motion for a rehearing of said cause, in words and figures as follows:

18 In the Kansas City Court of Appeals, March Term, 1921.

No. 13826.

MILES ELLIOTT, Movant and Petitioner, Respondent; BESSIE G. Welker, Administratrix of the Estate of Mern G. Welker, Deceased, Plaintiff.

vs.

WABASH RAILWAY COMPANY, Defendant; WALKER D. HINES, Director General of Railroads, Defendant, Appellant.

Appeal from the Livingston Circuit Court.

*Motion for a Rehearing.*

Comes now the Appellant, the Wabash Railway Company in the above entitled cause and moves the Court to recall and set aside the opinion rendered in this cause on the 23rd day of May, 1921 and grant it a rehearing of said cause for the following reasons, to-wit:

1st. Because the opinion of the Court is in conflict with the last previous controlling decision of the Supreme Court to which the attention of the Court was not called in the original Brief of Counsel for the reason that said opinion of the Supreme Court had not been reported at the time of the preparing and filing of said Briefs.

Adams vs. Quincy O. & K. C. R. R. Co., 229 S. W. 790.

19 2nd. Because the opinion of this Court holding that the Circuit Court of Livingston County, Missouri under the facts

in this case had jurisdiction over the Wabash Railway Company and could proceed to judgment against it in either the case of Bessie G. Welker, Plaintiff, vs. The Wabash Railway Company or Myles Elliott Movent vs. The Wabash Railway Company is in conflict with and contrary to the decisions of the Supreme Court of this State in the case of Adams vs. Quiney O. & K. C. R. R. Co., 229 S. W. 790.

3rd. Because the opinion of this Court is in conflict and contrary to the decisions of the Supreme Court in the following cases:

Mills vs. Metropolitan Ry. Co., 221 S. W. Page 1.

Wait vs. A. T. & S. F. Ry. Co., 204 Mo. 491.

O'Connor vs. Transit Co., 198 Mo. 622.

Taylor vs. Transit Co., 198 Mo. 715.

4th. Because the opinion of this Court in holding that Myles Elliott could assert and enforce his alleged lien or claim for attorneys' fees by a mere Motion in the case of Bessie Welker, Administratrix of the Estate of Mern G. Welker, deceased vs. The Wabash Railway Company overlooks the rule announced by the Supreme Court in such cases and the following decisions of the Supreme Court so hold:

Mills vs. Metropolitan Ry. Co., 221 S. W. Page 1.

Wait vs. A. T. & S. F. Ry. Co., 204 Mo. 491.

O'Connor vs. Transit Co., 198 Mo. 622.

Taylor vs. Transit Co., 198 Mo. 715.

5th. Because the opinion of this Court in holding that the Circuit Court of Livingston County had jurisdiction over the Wabash Railway Company and could proceed to judgment against it is in violation of the following cases and authorities:

Federal Control Acts, Sec. 10.

U. S. Compiled Statutes, Sec. 3115<sup>34</sup>.

Orders of Director General of R. Rs. Nos. 50 and 50-A.

Mardis vs. Hines, 258 Fed. Rep. 945.

Rutherford vs. U. P. R. R., 254 Fed. Rep. 880.

Hines vs. Dahn, 267 Fed. Rep. 111.

Blevins vs. Hines, 264 Fed. Rep. 1005.

Halbert vs. R. R., 259 Fed. Rep. 361.

6th. Because the opinion in holding that the trial Court properly gave declarations of law Numbers 3, 4 and 7 on the part of Myles Elliott and refusing Defendant's declarations of law Numbers 4, 5, 6, 9 and 13 was proper, is not justified by the authorities cited in the preceding points of this Motion.

Respectfully submitted,

N. S. BROWN,

W. W. DAVIS,

S. J. & G. C. JONES,

*Attorneys for Appellant.*

21 In the Kansas City Court of Appeals, March Term, 1921.

No. 13826.

MILES ELLIOTT, Movant and Petitioner, Respondent; BESSIE G. Welker, Administratrix of the Estate of Mern G. Welker, Deceased, Plaintiff.

vs.

WABASH RAILWAY COMPANY, Defendant; WALKER D. HINES, Director General of Railroads, Defendant, Appellant.

Appeal from the Livingston Circuit Court.

*Suggestions in Support of Motion for Rehearing*

I.

We respectfully submit that the opinion in this case conflicts with and is out of harmony with the rulings of the Supreme Court of this State and also with the Springfield Court of Appeals.

The holding of this Court that the Wabash Railway Company could be originally sued by Mrs. Welker, as Administratrix of her husband's estate, the Railway Company at that time being under Federal control, is in direct conflict with the case of Adams Q. O. K 22 C. R. R. Co. 229 S. W. 790. This case appears reported in the last number of the Southwestern Reporter and had not been published at the time we prepared and filed our original Briefs. For that reason the attention of the Court was not called to the decision. An examination of the facts show that the injury to plaintiff Adams occurred on October 28th, 1918. The petition was filed November, 1918. The Director General of Railroads and the Railroad corporation were each made defendants, both defendants filed answers setting up various defenses. A trial was had in the usual way known to the practice in this State. The jury under the instructions of the Court rendered a verdict in favor of the plaintiff and judgment was rendered against both defendants. The case was appealed to the Supreme Court, where one of the questions presented was, whether or not the action could be maintained against the Railroad corporation. It was held that it could not and this, notwithstanding the fact that it answered to the merits and tried the case on the merits as appears by the facts. It was held that the Railroad corporation was not liable. We quote from the Third Paragraph of the opinion as follows:

"That after Order No. 50 was promulgated on October 28th, 1918 by the Director General of Railroads the Railroad Company itself was no longer subject to the suit for personal injuries arising during Federal control of the Railroads whether such injury happened after or before the date of said Order No. 50."

Note the language above underscored "for personal injuries arising during Federal control of the Railroads." Federal control did not begin with the promulgation of General Order No. 50, but began with the approval of the Act of Congress of August 20th, 1906. The question that determines whether or not the Railroad corporation itself can be sued is not when the suit was brought. The question is did the injury occur during Federal control? If it did, then from the above quoted language, the Railroad Company was not liable. The Director General alone was the proper party defendant.

We quote further from the same Paragraph of the Opinion:

"This question was so fully, yet consistently considered by the Federal Court of Appeals, this Circuit, in *Mardis vs. Hines* (C. C. A. 267 Fed. 171, Opinion by Hook, J., that we content ourselves with referring to the opinion in that case as expressive of our views. The Springfield Court of Appeals in *Cravens vs. Hines* 218 S. W. 92, came to the same conclusion. The Acts of Congress, Proclamations of the President and Orders of the Director General of Railroads are quite fully set out in our Opinion in the case of *Kerstens vs. Hines* 223 S. W. 586, but said Order No. 50 especially, so far as it related to injuries occurring prior to its date has been held void in the following cases. (Citing numerous cases). We cannot concur in the reasoning of the opinions in these cases. We believe they take too narrow a view of the powers of the President and Director General of Railroads under said Acts of Congress."

The above case was reversed as to the Railroad corporation.

We respectfully contend that the above decision is exactly in point, and sustains our contention that the Railroad corporation could not be sued in this case, neither could Mr. Elliott in any way or manner whatever in this proceeding obtain a judgment against it enforcing his alleged lien for attorneys fee.

The case of *Cravens vs. Hine* 218 S. W. 912 cited by the Supreme Court in the above case was a case in which the defendant, the Missouri Pacific R. R. Company and the Director General of Railroads were jointly sued. The Railroad Company filed an Answer denying that it was operating the Railroad when the Plaintiff's cattle were injured (In the case at Bar the Answer of the Wabash Railway Company contains among others the same allegation), then the Answer pleaded to the merits as in the case at Bar. Judgment went against both defendants. The Springfield Court of Appeals held that this was improper and reversed the judgment as to the Railroad Corporation and affirmed it as against the Director General. We

quote from the Opinion as follows:

"We think that the trial Court should not have rendered judgment against the Railroad Company."

We note at Page 10 of the Opinion that this Court says:

This suit was brought before the promulgation of General Order 50 and we do not know what the Supreme Court would hold in case brought after October 28th, 1918.

This query is answered by the case of *Adams vs. R. R.*, supra. In that case the suit was brought after October 28th, 1918. The petition was filed November 19th, 1918 and the Court held that the Railroad Company was not liable and accordingly reversed the judgment as to the Railroad without remanding it. In other words, whatever that decision of the Supreme Court and the cases there cited with approval, it doesn't matter whether the suit was brought before or after the 18th day of October, 1918, the Railroad corporation is liable, provided the cause of action accrued while the Railroad was under Federal Control.

## II.

We respectfully submit that the opinion in this case is in direct conflict with opinions of the Supreme Court which are controlling. Namely, *Mills vs. Metropolitan Ry. Co.*, 221 S. W. 1; *Wait vs. R. R.*, 198 Mo. 491; *O'Connor vs. Transit Co.*, 198 Mo. 622; *Taylor vs. Transit Co.*, 198 Mo. 715.

We respectfully submit that the Court in its opinion has misinterpreted or misapplied the case of *Mills vs. Metropolitan Street Ry. Company* 221 S. W. 1 to the facts in this case. The Court after stating that Appellant contends that there is no authority under the Attorney's Lien Statute for a proceeding to enforce an attorney's lien by a Motion in the original cause of action where the settlement complained of is made before judgment and Respondent admits that if the suit was based on Section 690 of Attorneys' Lien Statute, that Appellants' contention would be taken, but contends that he has a right to proceed by Motion in the original cause where the proceeding is based on Section 691. He adds, "We do not find it necessary to pass upon these contentions for the reason that the situation in this case appears to be the same as that in the *Mills* case." It is true that the situation is the same as in the *Mills* case in so far as that the claim of the attorneys ought to be enforced by a mere Motion filed in the case and while Miles Elliott pleads in his Motion the contract that he made with Mrs. Welker, yet the real remedy sought for the amount of compensation claimed is based on the alleged contract which he alleges was made between Mr. Williamson and Mrs. Welker, that is, a contract which Williamson agreed that he would pay her attorney. In other words, he is not seeking to recover the percentage named in the contract between him and Mrs. Welker, but seeking to recover the amount which he claims Williamson agreed to pay. It should be borne in mind also that a recovery was based on the alleged contract or agreement between Williamson and Mrs. Welker at least, the amount of his compensation is based upon that alleged agreement.

We again submit that the evidence is absolutely insufficient to justify a finding in favor of Mr. Elliot on the alleged contract between Williamson and Mrs. Welker. It is too vague, indefinite and uncertain. There is nothing stated as to amount that Williams agreed to pay, if he agreed to pay anything.

This being the state of the record, we respectfully submit that under the Mills case and other cases before cited that Mr. Elliott must have resort to his remedy by an independent suit and not by intervening with a Motion in this case.

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## III.

We again respectfully submit that under the decisions which are our opinion are controlling on this Court, that the Circuit Court of Livingston County had no jurisdiction over the defendant, The Wabash Railway Company; that defendant at all times excepted to the jurisdiction of the Court over it, but even if it hadn't the judgment is still without authority. In other words, the want of jurisdiction over The Wabash Railway Company is apparent on the record and could be raised at any time. That we are right in this contention is not only decided by some of the Federal Courts. It is true that the decisions of the Federal Court on this question has not been uniform but as to what the rule is in this jurisdiction is settled by the decisions of our Supreme Court in the case of Adams vs. Q. O. K. R. R. Co., supra, decided March 5th, 1921; which decision is well understood to be controlling on this Court. It appears in that case as heretofore mentioned as well as in other cases which we have cited that the Railroad corporation appeared and answered to the merits and defended as to the merits, yet the Supreme Court and the Springfield Court of Appeals reversed outright judgments rendered against the corporations. With these decisions before us we fail to see how we can understand how a judgment in this case against The Wabash Railway Company can be sustained and for the same reasons and under the same authorities we respectfully insist that the trial Court committed error in its rulings on the Instructions as pointed out in our original Briefs.

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## IV.

Reference is made in the Opinion of this Court to the fact that the Director General has not appealed. Why should he appeal? The trial Court found in his favor and having done so we see no reason to know of reason why he should appeal. As to that finding however Mr. Elliott has appealed and his appeal appears on the Docket of this Court as Case No. 13,830.

We respectfully submit that this Motion for a re-hearing should be sustained and we ask that it be done.

N. S. BROWN,  
W. W. DAVIS,  
S. J. & G. C. JONES,  
*Attorneys for Appellant.*

28 And thereafter, to-wit, on June 27, 1921, the Court entered of record the following:

BESSIE G. WELKER, Admr., etc., Plaintiff,

vs.

WABASH RAILWAY COMPANY, Appellant; MILES ELLIOTT,  
Respondent.

Now at this day, the Court having considered and fully understood the appellant's motion for a rehearing herein, doth consider and adjudge that the said motion be and the same is hereby overruled. (Opinion on motion filed by Bland, J., Arnold, J. Concurring; Trimble, P. J. files dissenting opinion.)

Which said Opinion by Bland, J. on motion for rehearing is as follows:

29 No. 13826.

### On Motion for Rehearing.

Since the foregoing opinion was handed down the case of Adams v. Q. O. & K. C. Rd. Co. has been published in the Southwestern Reporter (229 S. W. 190) and in its motion for a rehearing defendant contends that our decision is in conflict with that one of the supreme court. That decision holds that the railroad company is not liable for the acts of those employed in the railroad service during federal control. On the original submission of this case we said, "This suit (Hite v. Ry., 225 S. W. 916) was brought before the promulgation of General Order No. 50 and we do not know what the supreme court of this state would hold in a case brought after October 28, 1918." The supreme court has answered this in the Adams case. However, we were careful in the opinion to say "we find it unnecessary to go into the question as to whether a recovery can be had against the railway corporation for the acts of the Director General," and placed our decision on the proposition that it was not necessary that there could be such a recovery but as Mrs. Welker had a bona fide doubtful claim against the railway corporation and that corporation settled it with her while the suit was pending against it, there was a sufficient consideration for the settlement and the settlement was paid and that, consequently, it was unnecessary for Elliott to show his client's claim was a valid one in the sense that the claimant be able to recover on it.

The fact that the claim was at least a doubtful one when the settlement was made is shown by the cases of Hite v. Ry., supra; Postal Tele. Co. v. Call, 255 Fed. 850; Jensen v. L. V. R. Co., 255 Fed. 795; Johnson v. McAdoo, 257 Fed. 757; Witherspoon v. Postal Etc. Co. 257 Fed. 758; The Catawissa, 257 Fed. 863; Dampskibsselskabet v. Hustis, 257 Fed. 862; Lavalley v. N. P. R. Co. 143 Minn. 74; Gowan v. McAdoo, 143 Minn. 227; Palyo v. N. P. R. Co.

175 N. W. 687; Ringquist v. M. and N. R. Co. 176 N. W. 344; McGregor v. G. N. R. Co. 172 N. W. 841; Franke v. C. & N. W. R. Co., 173 N. W. 701; M. P. R. Co. v. Ault, 216 S. W. 3; Lancaster v. Keebler, 217 S. W. 1117; Clapp v. Amer. Ex. Co., 234 Mass. 174; Owens v. Hines, 100 S. E. 617.)

With the concurrence of Arhold J. the motion for a rehearing is overruled and it is so ordered. Trimble, P. J. dissents.

EWING C. BLAND.

31 In the Kansas City Court of Appeals, March Term, 1921.

No. 13826.

BESSIE G. WELKER, Administratrix of the Estate of Mern G. Welker  
Deceased, Plaintiff.

VS.

WABASH RAILWAY COMPANY, Defendant, Appellant; MILES  
ELLIOTT, Movant and Petitioner, Respondent.

Appeal from Livingston Circuit Court.

*Dissenting Opinion by Trimble, P. J.*

As I view this case, the opinion affirming the judgment herein is erroneous, consequently a rehearing should be granted.

The proceeding is to enforce, against the Wabash Railway Company, an attorney's lien, under Sec. 691, R. S. 1919, upon a cause of action based upon the wrongful death of Mern G. Welker, alleged to have been caused on April 2, 1918, by the said railway company. He was killed on the said railroad on said date, but at that time the same was in the hands of and being operated by the Director General of Railroads and not by the Wabash Railway Company, nor was the latter responsible for such death. Adams vs. Quincy etc. R. Co. 229 S. W. 790.

The contract between the attorney and plaintiff, and which gives rise to the lien under Sec. 691, was to enforce a cause of action, against the Wabash Railway Company and the notice given, and the suit that was brought by the attorney under that contract, was

32 given to and was brought against the said railway company and not against the Director General. On November 16,

1918, the Director General settled with the plaintiff, paying her the sum of \$4,000 in full settlement of "all claims and demands at common law, or under the laws of any state or of the United States" which she had, arising out of the said wrongful death. There can be no question whatever but that the Director General paid the money and settled the case. The settlement and release, signed by plaintiff, says he did, and the draft for the \$4,000 received by plaintiff in settlement of her case shows that the money was paid by him. The former recites that the release is made "In consideration of the sum of Four Thousand Dollars (\$4,000.00) to me in hand paid by

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W. G. McAdoo, Director General of Railroads operating the Wabash Railroad" etc.; the draft for the \$1,000 bore the superscription "United States Railroad Administration W. G. McAdoo, Director General of Railroads" and was signed "Wabash R. R. Federal Account, F. L. O'Leary, Federal Treasurer."

Now, as I view it, the fallacy in the opinion of the majority is in holding that because the railway company used the settlement, made by the Director General, to get the suit against itself dismissed, therefore, the company is liable to plaintiff's attorney for his fee. I do not think this follows by any means. The Railway Company was not liable and never has, even impliedly, admitted liability.

It is true, one need not have an actual and valid cause of action against a party in order for the plaintiff's attorney, in the event of a settlement before judgment, to have a lien for his fee. All that is necessary is that there be in good faith a contention or reasonable dispute about the matter. In such case, if the other party settles with the plaintiff, such other party thereby impliedly admits the validity of such claim and by the settlement precludes the possibility of litigating the issue of liability, and hence should not be allowed to assert against the attorney that there was not, in law or in fact, any liability.

But that is not this case. Here, the party that was sued did not settle with or pay plaintiff. That was done by a person who was not sued, but who was liable; and the company, which was sued but was not liable, merely used the settlement made by the Director General to effect the dismissal of the case against it. There was in this no implied admission of liability on the part of the Railway Company. The release executed by plaintiff in consideration of the money paid by the Director General, who was not sued but who was liable, extinguished or satisfied plaintiff's cause of action; and as there remained no live cause of action in her, the defendant Railway Company had the right to the benefit of that extinguishment by having the case dismissed as to it without making itself liable for, or subject to, the lien of plaintiff's attorney for his fee.

For these reasons, I cannot agree with my associates, and am of the opinion that the motion for rehearing should be sustained instead of being overruled.

FRANCIS H. TRIMBLE, *C. J.*

34 And thereafter, to-wit, on June 30, 1921, the appellant filed in this Court its motion to transfer this cause to the Supreme Court of Missouri, which said motion is in words and figures as follows, to-wit:

"In the Kansas City Court of Appeals, March Term, 1921,

No. 13826.

MILES ELLIOTT, Movant and Petitioner, Respondent; BESSIE G. WELKER, *Administrator* of the Estate of Mern G. Welker, Deceased, Plaintiff,

VS.

WABASH RAILWAY COMPANY, Defendant, Appellant; WALKER D. HINES, United States Director General of Railroads, Defendant,

Appeal from Livingston Circuit Court.

*Motion to Transfer to the Supreme Court.*

Comes now the defendant, The Wabash Railway Company, by its attorneys and moves the Court to transfer this cause to the Supreme Court of the State of Missouri for the following reasons:

# I.

The original opinion of this Court affirming the judgment in the cause and the majority opinion overruling appellant's motion for a rehearing are in conflict with the last previous controlling opinion of the Supreme Court of the State of Missouri in the following case:

Adams vs. Q. O. & K. C. R. R. Co., 229 S. W. 790.

Miles v. Met. St. Ry. Co., 221 S. W. 1.

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# II.

The opinion in holding that Mr. Elliott could proceed by a motion filed in this cause to enforce his lien on the cause of action which had been compromised and settled at the time of filing the motion and when the motion was filed the cause of action being extinct there being nothing upon which to base the motion is in conflict with the last previous controlling decision of the Supreme Court.

Mills vs. Metropolitan Street Ry. Co., 221 S. W. 1.

Waite vs. R. R., 204 Mo. 491.

Taylor v. Transit Co., 198 Mo. 715.

O'Connor v. Transit Co., 198 Mo. 622.

# III.

The opinion of this court holding that the Circuit Court of Livingston County, Missouri had jurisdiction over the defendant, The Wabash Railway Company; said Railway Company at the time the cause of action sued on accrued and at the time of the commencement of this suit being under Federal control is in conflict with the last previous controlling decision of the Supreme Court of this

State and is in conflict — and contrary to decisions of the Federal Courts of the United States.

Adams vs. Q. O. & K. C. R. R. Co., 229 S. W. (Mo.) 790;  
Walker D. Hines, Director Genl. vs. H. F. A. Ault, (Decision by Supreme Court of U. S. not reported).  
Mardis vs. Hines, 259 Fed. Rep. 945;  
Rutherford vs. U. P. R. R. Co., 254 Fed. Rep. 880;  
Hines vs. Dahn, 267 Fed. Rep. 880;  
Blevins vs. Hines, 264 Fed. Rep. 1005;  
Halbert vs. R. R., 259 Fed. Rep. 361.

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## IV.

The decision of this Court holding that the Wabash Railway Company was liable to Movent, Miles Elliott, under the facts disclosed in the record, said railroad being at the time of the accrual of action and at the time of the commencement of suit under Federal control is contrary to the decisions of the Supreme Court of this State and of the Supreme Court of the United States and Federal District Courts cited under Point 3.

## V.

Because his Honor, Judge Trimble, the Presiding Judge of this Court dissented from a majority opinion overruling appellant's motion for a rehearing.

For the above and foregoing reasons, appellant respectfully prays the Court to transfer this cause to the Supreme Court of the State of Missouri.

Respectfully submitted,

N. S. BROWN,  
W. W. DAVIS,  
S. J. & G. C. JONES,  
*Attorneys for Appellant.*

And thereafter, to-wit, on July 7, 1921, the Court entered of record its order overruling said motion, in words and figures as follows, to-wit:

BESSIE G. WELKER, Admrx., Plaintiff,

vs.

WABASH RAILWAY COMPANY, Appellant; MILES ELLIOTT, Movent,  
Respondent.

Now at this day, the Court having considered and fully understood the appellant's motion to transfer this cause, to the  
37 Supreme Court, doth consider and adjudge that the said motion be and the same is hereby overruled.

STATE OF MISSOURI, *set*:

I, L. F. McCoy, Clerk of the Kansas City Court of Appeals, hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings had in said Court, the above entitled cause, as fully as the same remain of record and on file in my office.

In witness whereof, I have hereunto set my hand and affixed seal of said Court hereto, at office in Kansas City, Missouri, this 30 day of November, 1921.

[Seal of Kansas City Court of Appeals.]

L. F. McCOY,  
*Clerk*

1 In the Kansas City Court of Appeals, March Term, 1921.  
No. 13826.

BESSIE G. WELKER, Administratrix of the Estate of Mern G. Well,  
Deceased, Respondent,

vs.

WABASH RAILWAY COMPANY, Appellant.

Appeal from the Livingston Circuit Court.

Hon. Arch B. Davis, Judge.

APPELLANT'S ABSTRACT OF THE RECORD.

N. S. Brown, W. W. Davis, S. J. & G. C. Jones, Counsel for  
defendant.

Filed Apr. 2, 1921.  
L. F. McCOY,  
*Clerk*.

112 In the Kansas City Court of Appeals, March Term, 1921.  
No. 13826.

BESSIE G. WELKER, Administratrix of the Estate of Mern G. Welker,  
Deceased, Respondent,

VS.

WABASH RAILWAY COMPANY, Appellant.

Appeal from the Livingston Circuit Court.

Hon. Arch B. Davis, Judge.

APPELLANT'S ABSTRACT OF THE RECORD.

*Preliminary Statement.*

The controversy in this case grows out of a suit which was brought in the Circuit Court of Livingston County, Missouri, by the above named plaintiff, Bessie G. Welker, Administratrix of the Estate of Mern G. Welker, deceased vs. The Wabash Railway Company. Mern G. Welker, the husband of plaintiff, the administratrix while in the employ of the Wabash Railway Company was killed. Plaintiff as such administratrix entered into a contract with Miles Elliott who is designated as Movent to bring a suit under the Federal Employers' Liability Act to recover damages on account of her husband's death. In pursuance of such contract, Mr. Elliott did bring a suit against the Wabash Railway Company in its corporate capacity as sole defendant; while the suit was pending and before it was ever called for trial a compromise was effected. A stipulation dismissing the cause was filed at the January Term, 1919, of the Livingston County Circuit Court. Thereupon, Mr. Elliott obtained leave to file a motion in said cause setting up his claim for attorney's fees under his contract with the plaintiff. Such leave being granted he thereupon filed a motion in the case of Bessie G. Welker, Administratrix of Mern G. Welker vs. The Wabash Railway Company. Later, however, he obtained leave to and did file an amended motion making Walker D. Hines, Director General of Railroads a party of the proceedings. Service was then had or attempted to be had upon Mr. Hines. The issues being made up and the cause was tried at the January Term, 1919. At the conclusion of the evidence the Court found in favor of Mr. Elliott as against The Wabash Railway Company and rendered judgment in his favor against that Company, but at the same time found in favor of the

Director General of Railroads and against Mr. Elliott. The

3 Wabash Railway Company perfected an appeal to this Court.

Mr. Elliott also perfected an appeal in so far as the finding was in favor of the Director General. For the convenience of the Court and to the end that it may have the entire record before it we print

in our abstract of record, which follows the original petition filed the case wherein Bessie G. Welker, as Administratrix was plain and The Wabash Railway Company was defendant, likewise other pleadings that appear in the record.

#### ABSTRACT OF THE RECORD.

The Original Petition in this cause is as follows:

"In the Circuit Court of Livingston County, Missouri, to the September Term, 1918.

"BESSIE G. WELKER, Administratrix of the Estate of Mern Welker, Deceased, Plaintiff,

vs.

WABASH RAILWAY COMPANY, a Corporation, Defendant.

#### *Petition.*

Comes now the plaintiff and for cause of action against the defendant states that defendant is and was at all times hereinafter mentioned a railroad corporation duly organized and existing and that at all the times herein mentioned defendant was and now is a common carrier, for hire, of passengers and freight and as such operated its lines of railroad, its cars, locomotive engines, tracks, roadbed, passenger trains, freight trains, appliances and other equipment in the States of Iowa and Missouri and other states.

That on the 17th day of May, 1918, letters of administration on the estate of Mern G. Welker, deceased, were duly and legally granted and issued to Bessie G. Welker as administratrix, by the Probate Court of Shelby County, Missouri, and the said Bessie G. Welker duly qualified and entered upon the discharge of her duties as such administratrix and now is the duly and legally qualified acting administratrix of the estate of the said Mern G. Welker, deceased, and as such prosecutes this action.

Plaintiff states that on the 2d day of April, 1918, at the City of Shenandoah, in the County of Page and State of Iowa, defendant negligently killed and caused the death of the said Mern G. Welker (who was plaintiff's husband) by the means and in the manner hereinafter stated.

That on the 2d day of April, 1918, the said Mern G. Welker was in the service and employ of defendant as a brakeman on one of its freight trains and employed by defendant in and about the operation and movement of said train, and that on said date, and at about three o'clock in the morning and in the darkness of the night, and while so employed, it became and was the duty of the said Mern G. Welker, to engage and assist and he did engage and assist in certain movements and switching operation of the said freight train of defendant in defendant's yards in the City of Shenandoah, Iowa, and that in said switching movements

operations it became necessary and was the duty of the said Mern G. Welker to assume a position and ride, and that he did assume a position and ride upon the side of one of defendant's cars as the same, along with other cars, was being moved and switched from defendant's main line in the said City of Shenandoah, Iowa, on to and upon defendant's house-track in said city; and that while the said Mern G. Welker was in such position and so riding upon the side of one of defendant's cars, as aforesaid, as the same was being switched upon and along defendant's said house-track, certain other cars which had been set out on defendant's main line in said yards, did roll and run down its said main line and upon and against the body of the said Mern G. Welker and against the car upon which he was riding, and with great force and violence did run against, upon and did strike the said Mern G. Welker, and did cut and crush, maim, mangle and mash the body of the said Mern G. Welker, thereby causing his instant death.

That the defendant's said main line, at said place where the said cars had been set out thereon in the said yards, sloped from east to west, and that defendant, by its agents, servants and employes,

other than the said Mern G. Welker, negligently left said cars on defendant's said main line without setting the brakes thereon and negligently failed to set the brakes thereon, and that by reason of said negligence the said cars were allowed and caused to run and did run against and upon the body of the said Mern G. Welker, as aforesaid, and did cause his death as aforesaid, and the defendant's agents, servants and employes who set out the said cars on said main line, knew or by the exercise of ordinary care should have known that the said cars would not remain in the place or position in which they were set out, but would run down said main line and thereby endanger defendant's employes working in and about defendant's trains and cars in the said yards.

That the death of the said Mern G. Welker, as aforesaid, was so caused by said negligent acts of defendant, while defendant at the time and place aforesaid was engaged in commerce between the states and while the defendant was engaged in interstate commerce by railroad, and while the defendant was then and there engaged in moving and transporting its train, and the freight, merchandise and commodities thereon from one state to the destination thereof in other and different states, and while the said Mern G. Welker was employed and engaged by the defendant in inter-state commerce, and was actually employed and engaged in assisting, working and laboring with and about the transportation by railroad of defendant's train and the freight, merchandise and commodities thereon from one state to the destination thereof in other and different states, and while the said Mern G. Welker was employed, engaged and working in, upon and with a train engaged in inter-state commerce, and being run, and carrying freight, merchandise and commodities from one of the several states of the United States into other and different states.

That the said Mern G. Welker was at the time of his death 28 years of age; that his earning capacity was at that time about

\$125.00 per month, and that he was an able-bodied, intelligent, industrious man, in good health, of exemplary habits and had prospects of promotion and of a long life and great usefulness.

That the family of said Mern G. Welker consisted and consisted of Bessie G. Welker, his wife, now his widow, and Marthella Welker, his infant child of the age of — weeks; that the said Bessie G. Welker, his wife, and Marthella Welker, his infant daughter, were wholly dependent upon him for support and that up to the time of his death, as herein mentioned, the said Mern G. Welker, had provided for the support and maintenance of his said wife and infant daughter and had contributed to their support about \$100 per month, and that the said wife of said Mern G. Welker during his life and the said child of the said Mern G. Welker during his minority had a right and were entitled to their maintenance, care and support and to such contribution thereto, as aforesaid, by the said husband and father, and would have received the same but for the fact that he was negligently killed by defendant as herein stated, and that the said infant daughter of said Mern G. Welker had a right to and would have received, during her minority, the care, attention, instruction, training, advice and guidance of her said father had he not been killed by the negligence of the defendant, as aforesaid.

Plaintiff states that she is prosecuting this action under the Federal Employer's Liability Act, an Act of Congress approved April 22d, 1908, as amended April 5th, 1910, and that this section accrues and accrues under said Act of Congress.

Wherefore, plaintiff says that the said widow and infant child of the deceased, Mern G. Welker, and this plaintiff as administratrix have been damaged to the amount of one hundred thousand dollars for which sum with her costs she prays judgment.

MILES ELLIOTT.

*Attorney for Plaintiff*

Thereafter, to-wit at the January Term, 1919, of the Circuit Court of Livingston County, Missouri, a stipulation was filed in said cause for the dismissal of said cause; which stipulation is as follows:

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In the Circuit Court of Livingston County, Missouri, to the —  
Term, 1918.

BESSIE G. WELKER, Administratrix of the Estate of Mern G. Welker,  
Deceased, Plaintiff,

vs.

THE WABASH RAILWAY COMPANY, Defendant.

The subject matter of the above entitled cause having been  
fully settled between the parties hereto, it is hereby stipulated  
and agreed that said suit shall be dismissed at defendant's cost.

BESSIE G. WELKER,

*Administratrix of the Estate of  
Mern G. Welker, Deceased, Plaintiff.*

WABASH RAILWAY COMPANY,

*Defendant,*

By C. G. WILLIAMSON,

*Its Counsel."*

At the same Term of Court last aforesaid, Miles Elliott, plaintiff's  
attorney or record obtained leave to file a motion in his own behalf  
in said cause for the enforcement of his alleged claim and lien for  
attorney's fees and did on the 11th day of January, 1919, file said  
motion; which motion is as follows:

In the Circuit Court of Livingston County, Missouri, January Term,  
1919.

BESSIE G. WELKER, Administratrix of the Estate of Mern G.  
Welker, Deceased, Plaintiff,

vs.

WABASH RAILWAY COMPANY, a Corporation, Defendant.

10 *Motion to Enforce Attorney's Lien.*

Comes now Miles Elliott, attorney for plaintiff, in the above en-  
titled cause, and objects to the dismissal of said cause in pursuance of  
the purported stipulation for the dismissal thereof filed in this court  
on the 6th day of January, 1919, and moves and prays the court to  
protect and enforce his lien on the cause of action in said cause, under  
the attorney's lien statute of the State of Missouri, and for grounds  
for this motion alleges and shows:

That at all the times herein mentioned your movent and petitioner  
was and that he now is a duly licensed and practicing attorney in the  
State of Missouri;

That on the 2d day of April, 1918, one Mern G. Welker, while in  
the employ of defendant and while in the discharge of his duty was  
killed through the carelessness and negligence of defendant;

That on the 17th day of May, 1918, letters of administration of the estate of said Mern G. Welker, deceased, were by the probate court of Shelby County, Missouri, the court having jurisdiction of said estate, granted to Bessie G. Welker, the widow of said Mern G. Welker, and that said Bessie G. Welker on said day duly qualified as administratrix of said estate and at all times since has been and now the legally qualified and acting administratrix of said estate.

That thereafter, on said 17th day of May, 1918, the said Bessie G. Welker, administratrix of said Mern G. Welker, deceased, plaintiff in the above entitled cause, entered into contract with this movant and petitioner, which said contract is in words and figures as follows, to-wit:

*"Attorney's Contract.*

"This agreement made and entered into this 17th day of May, 1918, by and between Bessie Welker, administratrix, party of the first part, Miles Elliott, of Chillicothe, Missouri, parties of the second part.

"Witnesseth: That whereas the party of the first part, believing that she has a just claim for damages against Wabash Railway Company, account of the death of her husband, Mern G. Welker, who died April 2, 1918, and desiring to employ the legal services of the party of the second part as his sole and only attorney at law and in fact to investigate, settle, adjust, compromise or bring suit upon the above claim:

"The parties of the second part hereby agree to serve the first part faithfully in said matter, and to charge as their sole attorney's fee therein, which said first party agrees to allow and pay, fifty per cent of all money received upon the above claim or cause of action, whether by suit, compromise or settlement.

"Witness our hands to duplicate parts of agreement the day and date above written.

BESSIE WELKER.

*Administratrix, Party of the First Part.*

MILES ELLIOTT.

*Party of the Second Part.*

12 Wherein and whereby the said Bessie G. Welker, administratrix of said estate, employed movant and petitioner as his attorney to institute and prosecute in her behalf a claim or cause of action for damages against defendant, agreeing to pay him as compensation for his services a contingent fee of fifty per cent of the amount recovered, whether by suit, compromise or otherwise:

That movant and petitioner, on the 24th day of May, 1918, duly notified defendant of said contract and of his employment thereunder and of the terms of said contract and employment, by services upon defendant of a notice in writing, in words and figures as follows to-wit:

To the Wabash Railway, a corporation:

You are hereby notified that Bessie G. Welker, duly appointed by the Probate Court of Shelby County, Missouri, administratrix of the estate of Mern G. Welker, deceased, has entered into a contract in writing with the undersigned, under date of May 16th, 1918, by which she has employed the undersigned to act as her attorney in the prosecution and collection of a claim for damages against the Wabash Railway Company, a corporation, for the wrongful death of the said Mern G. Welker, occasioned by the said railway at Shenandoah, Iowa, on the 2nd day of April, 1918, the said Mern G. Welker being then and there in the employ of said Railway as a brakeman, and his death having been occasioned by the negligence of said railway, its agents and servants, while he was so employed; and that by said contract the said Bessie G. Welker has agreed and contracted to pay me as compensation for representing her as her attorney in the said claim for damages fifty per cent of any and all amounts that may be recovered on account of the death of the said Mern G. Welker, be the same collected for her as such administratrix or in any other capacity, whether the same be by suit, compromise, settlement or judgment.

Dated at Chillicothe, Missouri, this 23d day of May, 1918.

MILES ELLIOTT,

*Attorney at Law.*

That pursuant to said contract and employment your movent and petitioner caused to be instituted in this court the above entitled action, seeking to recover in behalf of such administratrix damages on account of the death of said Mern G. Welker, and that due service of summons in said action was had upon the defendant;

That depositions were taken in said suit and defendant's attorneys, S. J. Jones and W. W. Davis, appeared at the taking of said depositions;

That after defendant had full and complete knowledge of the terms and provisions of said contract between the said Bessie G. Welker, administratrix of said estate, and this movent and petitioner, the defendant, without the knowledge or consent of your movent and petitioner, negotiated a settlement wherein and whereby defendant agreed to pay plaintiff administratrix in settlement

and for the release of her cause of action in the said cause the sum of Four Thousand Dollars, and agreed to pay in addition thereto the sum of \$162.85 on account of the funeral or burial expenses of said Mern G. Welker, and agreed to pay the attorney's fee due and payable to your movent and petitioner as attorney of plaintiff administratrix for the prosecution of said claim for damages and cause of action;

That in fraud of the rights of your movent and petitioner defendant drew up the purported agreement for dismissal filed herein and procured its signature by plaintiff administratrix, without the knowledge or consent of your movent and petitioner, and fraudulently and wrongfully omitted to put in the said release the further

agreement that was entered into between plaintiff administratrix and defendant that defendant should pay the attorney's fee due to movant and petitioner; that plaintiff administratrix signed said purported release without an understanding of the contents thereof and relying upon the statement of defendant that it would pay the fee due this movant and petitioner as her attorney, and fraudulently and wrongfully omitted to require defendant to put the terms of the agreement for the settlement of said claim for damages and cause of action in said purported agreement for the release said cause of action;

That the said plaintiff administratrix received the sum of Four Thousand Dollars in settlement of her cause of action, and that defendant paid in said settlement the further sum of \$162.85 on account of the funeral or burial expenses of said Mern G. Welker, deceased;

That the signing of said purported release by plaintiff administratrix and the defendant, in the form in which the same is written and without showing the true agreement between the parties and the agreement to pay the attorney's fee due this movant and petitioner was a fraud upon the rights of this movant and petitioner;

That under and by virtue of the laws of the State of Missouri and under and by virtue of the settlement between defendant and plaintiff administratrix, this movant and petitioner became and now is entitled, under his contract of employment as aforesaid, to the sum of Four Thousand One Hundred Sixty-two and 85/100 Dollars;

That your movant and petitioner has a lien upon the cause of action in the said cause in the amount of Four Thousand One Hundred Sixty-two and 85/100 Dollars, and that to permit the dismissal of this cause under said alleged agreement for dismissal and to enter judgment of dismissal thereunder would wrongfully and illegally deforce movant and petitioner of his said lien and would be a fraud upon his rights, and would cause a multiplicity and complexity of action, and would compel movant and petitioner to bring and carry on another and separate suit for damages for the enforcement of his lien upon the cause of action;

That your movant and petitioner stands ready and is prepared to leave to make proof of the foregoing allegations of facts and to prove the amount of the fee due him in the premises and the amount of his lien.

Wherefore, your movant and petitioner prays the court that the lien on the cause of action above mentioned be enforced, that the court have judgment thereon in the sum of Four Thousand One Hundred Sixty-two and 85/100 Dollars, with interest from date of settlement and that execution issue therefor, and for such other and further relief, orders and decrees as may be meet and proper to prevent the perpetration of a fraud upon his rights and to protect his rights in the premises.

MILES ELLIOTT,  
*Movant and Petitioner*

Thereafter at the January Term, 1919, of said Court the said Miles Elliott was granted leave to file an amended motion, making Walker D. Hines, Director General of Railroads a party in said cause; which amended motion was filed on the 7th day of March, 1919; which said amended motion is as follows:

In the Circuit Court of Livingston County, Missouri, April Term, 1919.

BESSIE G. WELKER, Administratrix of the Estate of Mern G. Welker, Deceased, Plaintiff,

vs.

WABASH RAILWAY COMPANY, a Corporation, and WALKER D. HINES, United States Director General of Railroads, Defendant.

*Amended Motion to Enforce Attorney's Lien.*

Comes now Miles Elliott, attorney for plaintiff, and by leave of court first had and obtained, files this his amended motion, and objects to the dismissal of said cause in pursuance of the purported stipulation for the dismissal thereof filed in this court on the 6th day of January, 1919, and moves and prays the court to protect and enforce his lien on the cause of action in said cause, under the attorney's lien statute of the State of Missouri, and for grounds for this motion alleges and shows:

That at all the times herein mentioned your movant and petitioner was and that he now is a duly licensed and practicing attorney in the State of Missouri:

That at all the times herein mentioned defendant Wabash Railway Company and its railway was to some extent or degree under the administration and control of the United States Railway Administration and of the United States Director General of Railroads, under and by virtue of an Act of Congress known as the "Federal Control Act," passed and approved March 21st, 1918, and other acts, and the proclamations of the President thereunder dated December 26th, 1917, and April 11th, 1918, and that defendant Walker D. Hines is Director General of Railroads under authority of such Acts of Congress and Proclamations of the President; that by his General Order No. 50 the Director General of Railroads, on November 1st, 1918, ordered that he be made a party to all suits then pending against railroads upon any cause of action arising since December 31st, 1917; that the action herein is such a suit;

That on the 2d day of April, 1918, one Mern G. Welker, while in the employ of defendants and while in the discharge of his duty is killed through the carelessness and negligence of defendants;

That on the 17th day of May, 1918, letters of administration on the estate of said Mern G. Welker, deceased, were by the probate court of Shelby County, Missouri, the court having jurisdiction of said estate, granted to Bessie G. Welker, the widow of said Mern G.

Welker, and that said Bessie G. Welker on said day duly qualified as administratrix of said estate and at all times since has been and is now the legally qualified and acting administratrix of said estate;

That thereafter, on said 17th day of May, 1918, the said Bessie G. Welker, administratrix of said Mern G. Welker, deceased, plaintiff in the above entitled cause, entered into a contract with the movant and petitioner, which said contract is in words and figures as follows, to-wit:

*"Attorney's Contract.*

"This agreement made and entered into this 17th day of May, 1918, by and between Bessie Welker, administratrix, party of the first part, Miles Elliott, of Chillicothe, Missouri, parties of the second part.

"Witnesseth: That whereas the party of the first part, believes that she has a just claim for damages against Wabash Railway Company account of the death of her husband, Mern G. Welker, who died April 2, 1918, and desiring to employ the legal services of the party of the second part as *his* sole and only attorney at law and in fact, to investigate, settle, adjust, compromise or bring suit upon the above claim;

"The parties of the second part hereby agree to serve the first party faithfully in said matter, and to charge as *their* sole attorney fee therein, which said first party agrees to allow and pay, fifty per cent of all money received upon the above claim or cause of action, whether by suit, compromise or settlement.

20 "Witness our hands to duplicate parts of agreement the 17th day of May, 1918, and date above written.

BESSIE WELKER,

*Administratrix, Party of the First Part*

MILES ELLIOTT,

*Party of the Second Part*

Wherein and whereby the said Bessie G. Welker, administratrix of said estate, employed movant and petitioner as her attorney to institute and prosecute in her behalf a claim or cause of action for damages against defendants, agreeing to pay him as compensation for his services a contingent fee of fifty per cent of any amount recovered, whether by suit, compromise or otherwise;

That movant and petitioner, on the 24th day of May, 1918, duly notified defendants of said contract and of his employment thereunder and of the terms of said contract and employment, by serving upon defendants of a notice in writing, in words and figures as follows, to-wit:

"To the Wabash Railway, a corporation:

You are hereby notified that Bessie G. Welker, duly appointed by the Probate Court of Shelby County, Missouri, administratrix of the estate of Mern G. Welker, deceased, has entered into a contract

writing with the undersigned, under date of May 16th, 1918, by which she has employed the undersigned to act as her attorney  
21 in the prosecution and collection of a claim for damages against the Wabash Railway Company, a corporation, for the wrongful death of the said Mern G. Welker, occasioned by the said railway at Shenadoah, Iowa, on the 2nd day of April, 1918, the said Mern G. Welker being then and there in the employ of said Railway as a brakeman, and his death having been occasioned by the negligence of said railway, its agents and servants, while he was so employed; and that by said contract the said Bessie G. Welker has agreed and contracted to pay me as compensation for representing her as her attorney in the said claim for damages fifty per cent of any and all amounts that may be recovered on account of the death of the said Mern G. Welker, be the same collected for her as such administratrix or in any other capacity, whether the same be by suit, compromise, settlement or judgment.

Dated at Chillicothe, Missouri, this 23d day of May, 1918.

MILES ELLIOTT,

*Attorney at Law.*

That the agent of the defendant railway company, upon whom said notice was then and there served, was also then and there the agent of the Director General of Railroads, and that said notice was therefore in fact and in truth served upon the Director General of Railroads as well as upon defendant Railway Company.

22 That depositions were taken in said suit and the attorneys of the defendant railway company and defendant Director General of Railroads appeared at the taking of said depositions;

That after defendants had full and complete knowledge of the terms and provisions of said contract between the said Bessie G. Welker, administratrix of said estate, and this movant and petitioner, the defendants, without the knowledge or consent of your movant and petitioner, negotiated a settlement wherein and whereby defendants agreed to pay plaintiff administratrix in settlement and for the release of her cause of action in the said cause the sum of Four Thousand Dollars, and agreed to pay in addition thereto the sum of \$162.85 on account of the funeral or burial expenses of said Mern G. Welker, and agreed to pay the attorney's fee due and payable to your movant and petitioner as attorney of plaintiff administratrix for the prosecution of said claim for damages and cause of action;

That in fraud of the rights of your movant and petitioner defendants drew up the purported agreement for dismissal filed herein and procured its signature by plaintiff administratrix, without the knowledge or consent of your movant and petitioner, and fraudulently and wrongfully omitted to put in the said release the further agreement that was entered into between plaintiff administratrix and defendants that defendants should and would pay the attorney's fee due this movant and petitioner; that plaintiff administratrix signed said purported release without an understanding of the contents

thereof, and relying upon the statement of defendants that they would pay the fee due this movent and petitioner as his attorney, and fraudulently and wrongfully omitted to require defendants to put the true terms of the agreement for the settlement of said claim for damages and cause of action in said purported agreement for the release of said cause of action;

That the said plaintiff administratrix received the sum of Four Thousand Dollars in settlement of her cause of action, and that defendants paid in said settlement the further sum of \$162.85 on account of the funeral or burial expenses of said Mern G. Welke deceased;

That the signing of said purported release by plaintiff administratrix and the defendants, in the form in which the same is written and without showing the true agreement between the parties and the agreement to pay the attorney's fee due this movent and petitioner was a fraud upon the rights of this movent and petitioner;

That under and by virtue of the laws of the State of Missouri and under and by virtue of the settlement between defendants and plaintiff administratrix, this movent and petitioner became and is and now is entitled, under his contract of employment as aforesaid to the sum of Four Thousand One Hundred Sixty-two and 85/100 Dollars;

That your movent and petitioner has a lien upon the cause of action in the said cause in the amount of Four Thousand One Hundred Sixty-two and 85/100 Dollars, and that to permit the dismissal of this cause under said alleged agreement for the

dismissal and to enter judgment of dismissal thereunder would wrongfully and illegally deforce movent and petitioner of his said lien and would be a fraud upon his rights, and would cause a multiplicity and circuity of action, and would compel movent and petitioner to bring and carry on another and separate suit for damages for the defeasement of his lien upon the cause of action;

That your movent and petitioner stands ready and asks leave to make proof of the foregoing allegations of fact and to prove the amount of the fee due him in the premises and the amount of his lien.

Wherefore, your movent and petitioner prays the court that the lien on the cause of action above mentioned be enforced, that he have judgment thereon in the sum of Four Thousand One Hundred Sixty-two and 85/100 Dollars, with interest from date of settlement and that execution issue therefor against the defendants, and for such other and further relief, orders and decrees as may be meet and proper to prevent a perpetration of a fraud upon his rights and to protect his rights in the premises.

MILES ELLIOTT,  
*Movent and Petitioner.*

Thereafter, at the January Term, 1920, the defendant, The Wabash Railway Company, filed its Separate Answer and Plea in Abatement which omitting caption and signatures, is as follows:

25     *Separate Answer of the Wabash Railway Company to  
         Amended Motion of Miles Elliott.*

Comes now the defendant, The Wabash Railway Company, and limits its appearance for the sole and only purpose of this, its Plea in Abatement, and to the jurisdiction of the Court over this defendant and the cause of action therein alleged and particularly to the Amended Motion of Miles Elliott herein, praying the Court for the enforcement of his alleged lien on plaintiff's alleged cause of action, says:

That at the time of the (alleged) death of the said Mern G. Welker, husband of the said Bessie G. Welker, that this defendant the Wabash Railway Company did not operate, control or manage and was not in the possession of the property, railroad, rights and franchise of said Wabash Railway Company but that at all of said times, all of the rights, railroad, property, franchises, rolling-stock and all other equipment of the Wabash Railway Company, under and by virtue of an Act of the Congress of the United States, passed and approved March 21st, 1918, and by proclamations of the President of the United States, passed and promulgated under and by authority of Acts of Congress in that behalf were taken in charge of and were in the sole possession, control and management and operation of the Federal Government and particularly in charge of and under the control, management and operation of William G.

26     McAdoo, who at that time was Director General of the Railroads of the United States, so appointed and so designated by the President of the United States under and by authority of said Act of Congress and that the injuries which resulted in the death of the said Mern G. Welker occurred while the railroad, properties, rights, franchises, privileges and rolling stock of said Wabash Railway Company were so under the control, management and operation of the said William G. McAdoo, as such Director General of Railroads.

That at all of said times this defendant did not have or maintain an office or place of business in Chillicothe or in Livingston County in charge of an agent upon whom process could be served and that the person on whom process was served in this cause was not an agent and did not represent in any way or manner whatever this defendant and that any process that was served in this cause was not served on an agent of this defendant.

Wherefore, this defendant says that this Court acquired no jurisdiction over this defendant or of said cause of action alleged in plaintiff's petition herein or of the motion of the said Miles Elliott herein as against this defendant.

Further answering in the nature of a Plea in Abatement and to the jurisdiction of this Court over plaintiff's said cause of action and movent's motion herein, this defendant says that the cause of action purported to be alleged in plaintiff's petition herein did not accrue in Livingston County, neither was plaintiff a resident or citizen of

Livingston County, Missouri, but that the injuries which resulted in the death of the said Mern G. Welker occurred at Shenandoah, Iowa, and that plaintiff is a resident and citizen of Shelby County, Missouri; that under the proclamations of the President and orders of the Director General of Railroads, that it is provided that in suits or causes of action of this character, that the same should be brought at the place where the cause of action accrued or where plaintiff resided, but in violation of said proclamations and orders, this suit was brought in Livingston County, Missouri, by reason of which this defendant avers the fact to be that this Court is without jurisdiction over defendant or as to the cause of action alleged in plaintiff's petition and in movant's motion herein.

For further plea to the jurisdiction of the Court, this defendant says: That on the 28th day of October, 1918, that by general Order No. 50 made and promulgated by the Director General of Railroads, that it is provided that "Action at law \* \* \* claims for death or injury to persons or for loss and damage to property arising since December 31st, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceeding brought for Federal control might have been brought against the carrier company shall be brought against William G. McAdoo, Director General of Railroads and not otherwise." This defendant says that since the promulgation of said Order, the said William G. McAdoo resigned as Director General of Railroads and that Walker D. Hines was by the President of the United States appointed as

Director General of Railroads in the place and stead of the said William G. McAdoo, resigned, and that said Walker D. Hines succeeded to all of the powers, rights, privileges, duties and immunities which the said William G. McAdoo possessed under said Order, that this suit was brought and the motion of the movant, the said Miles Elliott, was filed in violation of this Order in this: that the said Mern G. Welker, the husband of plaintiff, died subsequent to October 28th, 1918, from injuries received in the State of Iowa; that at the time of his death, he was a citizen and resident of Shelby County, Missouri, and that plaintiff, the said Bessie G. Welker, was by the Probate Court of Shelby County, Missouri, appointed Administratrix of the estate of the said Mern G. Welker, deceased, and that it appears that this suit was brought against the Wabash Railway Company as sole defendant herein and not against the Director General of Railroads as provided and required by said Orders and proclamations; that process was issued against this defendant in violation of said Order.

Wherefore, this defendant says the Court is without jurisdiction of the cause of action alleged in plaintiff's petition or any other proceedings or pleading filed therein.

Without waving any of the matters hereinbefore pleaded in abatement and bar of this action and of movant's motion herein, this defendant for further answer denies that it made any settlement, compromise or adjustment of plaintiff's alleged cause of action, denies that any agent, claim agent, assistant claim

agent or anyone representing or authorized to represent this defendant made any such settlement of said claim or cause of action, if any, was not paid with any funds, money or property belonging to this defendant or under its control.

Further answering defendant denies that it had any notice or knowledge of any contract existing between plaintiff and the said movant herein, that no notice of any contract or understanding between the said Miles Elliott and plaintiff herein for attorneys' fees was served on any agent or employee of this defendant.

Further answering, defendant denies each and every other allegation in said motion contained.

Wherefore this defendant, The Wabash Railway Company, says that it is not liable to the said Miles Elliott on account of the claim or claims made and alleged by him in said motion. Defendant therefore prays that said motion be over-ruled and denied.

Thereafter, to-wit, at the January Term, 1920, the said Walker D. Hines, Director General of Railroads, filed his Separate Answer and Plea in Abatement, which omitting caption and signatures, is as follows:

30                    *Separate Answer of Walker D. Hines.*

Comes now the defendant, Walker D. Hines, Director General of Railroads of the United States of America, and for his separate answer and limits his appearance for the sole and only purpose of this his answer in the nature of a Plea in Abatement and plea to the jurisdiction of the Court over this defendant and as to the cause of action alleged in the Motion of Miles Elliott, movant herein, as against this defendant and for no other purpose whatever.

For his answer in the nature of a Plea in Abatement and plea to the jurisdiction of the Court over this defendant and the cause of action alleged in the motion of Miles Elliott, movant herein, this defendant says that under and by virtue of an Act of Congress, called the "Federal Control Act" passed by the Congress of the United States and approved by the President of the United States on March 21st, 1918, and by proclamation of the President of the United States under and by virtue of said Act, that the President of the United States took possession and assumed control of the railway systems of the United States and particularly of the property, rights, franchises of the Wabash Railway Company and by proclamation under and by authority of said Act of Congress the President of the United States named and designated this defendant as Director General of Railroads and at all of the times mentioned in plaintiff's petition herein and in the motion of Miles Elliott herein, said property, rights and franchises of said Wabash Railway Company were in the sole possession of, under the control, management and operation of the Federal Government and were not under the control, operation and management of the Wabash Railway Company.

31                    Further pleading to the jurisdiction of this Court over this defendant and as to said cause of action as against this defendant, de-

fendant says: That it is provided in and by general order No. 50 promulgated under and by authority of law under date of October 28th, 1918, that "Actions at law \* \* \* claims for death or injury to persons or for loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceeding but for Federal Control might have been brought against the carrier company shall be brought against William G. McAdoo, Director General of Railroads and not otherwise." This defendant says that since the promulgation of said Order he has been appointed as the successor of the said William G. McAdoo as Director General of Railroads and possesses all the powers and has succeeded to all of the rights, immunities and privileges which the said William G. McAdoo possessed under said Order. This defendant avers the fact to be that Mern G. Welker, the husband of Bessie G. Welker, plaintiff herein, died subsequent to October 28th, 1918, from injuries he received at Shenandoah, Iowa; that at the time of his

death, he was a citizen and resident of Shelby County, in the State of Missouri; that said Bessie G. Welker was by the Probate Court of Shelby County, Missouri, appointed Administratrix of his estate; that this suit was brought in the Circuit Court of Livingston County, Missouri, subsequent to the death of the said Mern G. Welker against The Wabash Railway Company as sole defendant in violation of said general Order No. 50; that process was issued against The Wabash Railway Company as sole defendant by the Clerk of this Court and that the return of process in this cause shows that the only defendant attempted to be served with process was the said Wabash Railway Company; that no process whatever was ever issued in said cause as against this defendant or his predecessor in office as the Director General of Railroads.

Wherefore, this defendant says that this Court has no jurisdiction of this defendant or of the cause of action alleged in movant's submission as against this defendant.

For further answer in the nature of a Plea in Abatement as to the jurisdiction of the Court over this defendant and cause of action herein and to the cause of action and claim of the movant the said Miles Elliott herein, this defendant says that under and by virtue of an order issued and promulgated under authority of law that it was provided that in all cases, claims or causes of action against railways or transportation lines so taken under Federal control as hereinbefore alleged, that such suits, claims or causes

of action should be brought in the county or place where said cause of action accrued or where the plaintiff resided; that this suit was brought by the plaintiff the said Bessie G. Welker in violation of said Order and proclamation in this, that said cause of action, if any, arose and accrued in the State of Iowa, that said Mern G. Welker received his injuries which resulted in his death in the State of Iowa and the plaintiff, the said Bessie G. Welker, resided in the County of Shelby, in the State of Missouri, and that therefore under said Order and proclamation, this suit could only

be brought in the County in the State of Iowa where said cause of action accrued or in Shelby County, Missouri, where plaintiff resided.

Wherefore, defendant says this Court was without jurisdiction of said cause of action and the said motion of said Miles Elliott and prays that all proceedings as to and against this defendant may be dismissed and abated.

Further answering and without waiving any of the matters hereinbefore alleged in abatement and bar of this action, this defendant says that he denies that any process whatever was ever issued or served upon him or his predecessor in office as Director General of Railroads; that he never had any notice or knowledge of any contract existing between plaintiff and the movent, the said Miles Elliott herein whereby he, the said Miles Elliott, was given a lien on said cause of action.

Further answering, this defendant denies each and every allegation in movent's motion contained.

Wherefore having fully answered this defendant prays to be discharged with his costs.

The reply of Miles Elliott, Movent, to the above Answers and Pleas in Abatement was a general denial.

### *Trial.*

This cause was tried at the January Term, 1920, of the Circuit Court of Livingston County, Missouri, a jury being waived.

At the conclusion of the evidence the Court took the cause under advisement until the 30th day of January, 1920; said date being during the regular January Term, 1920, of said Court, and on said date the Court rendered the following judgment, to-wit:

### *Judgment.*

Now at this day this cause coming on for final hearing and determination by the court, the court having herefore heard the evidence herein and being now fully and sufficiently advised in the premises, doth find the issues herein in favor of Miles Elliott, Movent and Petitioner, and against defendant, Wabash Railway Company, in the sum of Four Thousand One Hundred Sixty-two Dollars and Eighty-five Cents.

It is therefore ordered and adjudged by the Court that Miles Elliott, Movent and Petitioner, have and recover of defendant, Wabash Railway Company, the said sum of Four Thousand One Hundred Sixty-two Dollars and Eighty-five Cents (\$4,162.85), with interest from this 30th day of January, 1920, at the rate of six per cent per annum, together with his costs in this behalf expended and that execution issue therefor, and the court doth find the issues in favor of defendant, Walker D. Hines, United States Director General of Railroads and that he go hence and recover of Miles Elliott, Movent and Petitioner, his costs in this behalf expended and that execution issue therefor."

*Motion for New Trial Filed — Overruled.*

Thereafter, to-wit, at the same Term of Court and on the same day last aforesaid, and within four days after said judgment, the defendant the Wabash Railway Company filed its Motion for a New Trial; which motion was on the same day taken up, heard and considered and was by the Court over-ruled, all of which appears by record entry made at the time.

*Motion in Arrest Filed and Overruled.*

And on the same day and at the same Term of Court last aforesaid, the defendant the Wabash Railway Company filed its Motion in Arrest of Judgment; which Motion was on the same day and at the same Term of Court over-ruled, as appears by record entry made at the time.

36

*Leave to File Bill of Exceptions.*

On the same day and at the same Term of Court, last aforesaid, the defendant the Wabash Railway Company was given leave to file its Bill of Exceptions in said cause.

*Appeal Taken.*

Defendant the Wabash Railway Company duly took an appeal in said cause.

*Bill of Exceptions Filed.*

Defendant the Wabash Railway Company duly filed its Bill of Exceptions in said cause, which Bill of Exceptions is as follows (caption omitted):

*Bill of Exceptions.*

Be it known that on Wednesday, January 7, 1920, the same being the third day of the regular January Term, 1920, of the Circuit Court within and for the County of Livingston, State of Missouri, the above entitled cause coming on for trial in said court before the Honorable Arch B. Davis, Judge of said Court, a jury being waived by both parties hereto and the cause submitted to the court, the movent being present in person and by his counsel, Kimbrell & O'Donnell, and the defendant being present by its counsel, S. J.

37 Jones and W. W. Davis, and both parties announcing readiness for trial, upon the issues joined, the following proceedings were had and made of record, to-wit:

Thereupon, counsel for movent and counsel for defendants read their respective pleadings to the court; and the movent and peti-

troner, to maintain the issues upon his part, offered and introduced the following evidence, to-wit:

By Mr. Elliott: It is admitted by and between the parties hereto that Miles Elliott, movent, herein, is a duly licensed and practicing attorney at law, and that the contract and paper marked Exhibit One herein contains the genuine signature of Bessie G. Welker, Administratrix, and the genuine signature of Miles Elliott, movent.

It is further admitted that at all the times mentioned in the motion of Miles Elliott, movent, Bessie G. Welker was the duly appointed, qualified and acting administratrix of the Estate of Mern G. Welker, deceased.

It is further admitted by the parties hereto that Miles Elliott, Movent herein, had no information or knowledge of the making of the settlement alleged in his motion until long after the same had been made and until after payment had been made thereon and that said Miles Elliott, movent, did not give his consent thereto.

By Mr. Jones: Defendants object to the introduction of any evidence in this case for the reason that the Circuit Court of Livingston County, Missouri, has no jurisdiction over either or both of the defendants, over the cause of action alleged in plaintiff's petition or over the cause of action alleged in movent's motion herein.

By the Court: Objection over-ruled.

To which action and ruling of the court the defendants and each of them, by counsel, then and there duly excepted at the time and still except.

By Mr. Elliott: Movent herein offers in evidence the contract between Miles Elliott and Bessie G. Welker, Administratrix, which has been marked by the Reporter as Exhibit One.

By Mr. Jones: The defendant, Wabash Railway Company, objects to the contract, Exhibit One, being admitted in evidence for the reason that at the time the contract was made and at the time of the death of Mern G. Welker that the property rights and franchises of the Wabash Railway Company had been taken from its possession under an Act of Congress of the United States by proclamation of the President of the United States, and were in the sole control, use and operation of the Federal Government; and for the

further reason that the contract on its face shows that it was not made by authority and with the consent of the Probate Court of Shelby County, Missouri; at any rate, no authority on the part of Bessie G. Welker as Administratrix was granted by the Probate Court to enter into said contract.

By the Court: "The objection is over-ruled."

To which action and ruling of the court the defendant, Wabash Railway Company, by counsel, then and there duly excepted at the time and still excepts.

By Mr. Jones: Defendant, Walker D. Hines, Director General, objects to the contract, Exhibit One, being admitted in evidence for the reason that upon the face of the contract it appears that it could not and would not be binding upon this defendant; the contract on

its face shows that it was a contract between the said Bessie G. Welker and Miles Elliott to bring a suit against the Wabash Railway Company and not against this defendant; and for the further reason that the record in this cause shows that the suit brought by the said Miles Elliott, under the terms of said contract, was brought against the Wabash Railway Company as sole defendant; for the further reason that no authority is shown on the part of said Bessie Welker to enter into said contract as administratrix and it does not appear that she obtained such authority from the Probate Court to enter into said contract as administratrix.

40 By the Court: Which objection is by the court over-ruled.

To which action and ruling of the court the defendant, Walter D. Hines, Director General, by counsel, then and there duly excepted at the time and still excepts.

And which said Exhibit One, so offered and introduced in evidence, with all endorsements thereon, is in the words and figures following:

#### EXHIBIT ONE.

##### *"Attorney's Contract.*

"This agreement made and entered into this 17th day of May 1918, by and between Bessie Welker, administratrix, party of the first part, Miles Elliott of Chillicothe, Missouri, parties of the second part.

Witnesseth: That whereas the party of the first part, believing that she has a just claim for damages against Wabash Railway Company on account of the death of her husband, Mern G. Welker, who died April 2, 1918, and desiring to employ the legal services of the party of the second part as *his* sole and only at-orney at law and to fact to investigate, settle, adjust, compromise or bring suit upon the above claim;

41 The parties of the second part hereby agree to serve the first party faithfully in said matter, and to charge as their sole attorney fee therein, which said first party agrees to allow and pay fifty per cent of all moneys received upon the above claim or cause of action, whether by suit, compromise or settlement.

Witness our hands to duplicate parts of this agreement the day and date above written.

BESSIE WELKER,

*Administratrix, Party of the First Part.*

MILES ELLIOTT,

*Party of the Second Part.*

By Mr. Elliott: We offer in evidence on the part of the Moving the petition filed by Bessie G. Welker, Administratrix of the Estate of Mern G. Welker, deceased, vs. Wabash Railway Company, a corporation, in this cause, and filed in this court June 5th, 1918, together with said filing mark thereon; and Movant also offers

evidence the original writ or summons, together with Sheriff's return thereon, filed in this court June 10th, 1918, together with the filing mark of the Clerk thereon.

Which said Petition and Summons, so offered and introduced in evidence, together with all endorsements thereon, are in the words and figures following, to-wit:

42 "In the Circuit Court of Livingston County, Missouri, to the September Term, 1918.

"BESSIE G. WELKER, Administratrix of the Estate of Mern G. Welker, Deceased, Plaintiff,

vs.

WABASH RAILWAY COMPANY, a Corporation, Defendant.

*Petition.*

Comes now plaintiff and for cause of action against the defendant states that defendant is and was at all the times hereinafter mentioned a railroad corporation duly organized and existing and that at all the times herein mentioned defendant was and now is a common carrier, for hire, of passengers and freight, and as such operated its lines of railroad, its cars, locomotive engines, tracks, roadbed, passenger trains, freight trains, appliances and other equipment in the States of Iowa and Missouri and other states.

That on the 17th day of May, 1918, letters of administration on the estate of Mern G. Welker, deceased, were duly and legally granted and issued to Bessie G. Welker as administratrix, by 43 the Probate Court of Shelby County, Missouri, and the said Bessie G. Welker duly qualified and entered upon the discharge of her duties as such administratrix and now is the duly and legally qualified and acting administratrix of the estate of the said Mern G. Welker, deceased, and as such prosecutes this action.

Plaintiff states that on the 2d day of April, 1918, at the City of Shenandoah, in the County of Page and State of Iowa, defendant negligently killed and caused the death of the said Mern G. Welker (who was plaintiff's husband) by the means and in the manner hereinafter stated.

That on the 2d day of April, 1918, the said Mern G. Welker was in the service and employ of defendant as a brakeman on one of its freight trains and employed by defendant in and about the operation and movement of said train, and that on said date, and about three o'clock in the morning and in the darkness of the night, and while so employed, it became and was the duty of the said Mern G. Welker, to engage and assist and he did engage and assist in certain movements and switching operations of the said freight train of defendant in defendant's yards in the City of Shenandoah, Iowa, and that in said switching movements and operations it became necessary and was the duty of the said Mern G. Welker to assume a position and ride, and that he did assume a position

and ride upon the side of one of defendant's cars as the same, along with other cases, was being moved and switched from defendant's

main line in the said City of Shenandoah, Iowa, on to and

14 upon defendant's house-track in said city; and that while

the said Mern G. Welker was in such position and so riding upon the side of one of defendant's cars, as aforesaid, as the same was being switched upon and along defendant's said house-track certain other cars which had been set out on defendant's main line in said yards, did roll and run down its said main line and upon and against the body of the said Mern G. Welker and against the car upon which he was riding, and with great force and violence did run against, upon and did strike the said Mern G. Welker and did cut and crush, maim, mangle and mash the body of the said Mern G. Welker, thereby causing his instant death.

That the defendant's said main line, at said place where the said cars had been set out thereon in the said yards, sloped from east to west, and that defendant, by its agents, servants and employees other than the said Mern G. Welker, negligently left said cars on defendant's said main line without setting the brakes thereon and negligently failed to set the brakes thereon, and that by reason of said negligence the said cars were allowed and caused to run and did run against and upon the body of the said Mern G. Welker as aforesaid, and did cause his death as aforesaid, and the defendant's agents, servants and employees who set out the said cars on said main line, knew or by the exercise of ordinary care should have known that the said cars would not remain in the place or position in which they were set out, but would run down said main line and thereby endanger defendant's employees in and about defendant's trains and cars in the said yards.

15 That the death of the said Mern G. Welker, as aforesaid, was so caused by said negligent acts of defendant, while

defendant at the time and place aforesaid was engaged in commerce between the states and while the defendant was engaged in interstate commerce by railroad, and while the defendant was then and there engaged in moving and transporting its train, and the freight, merchandise and commodities thereon from one state to the destination thereof in other and different states, and while the said Mern G. Welker was employed and engaged by the defendant in interstate commerce, and was actually employed and engaged in moving, working and laboring with and about the transportation of the railroad of defendant's train and the freight, merchandise and commodities thereon from one state to the destination thereof in other and different states, and while the said Mern G. Welker was employed, engaged and working in, upon and with a train so engaged in interstate commerce, and being run, and carrying freight, merchandise and commodities from one of the several states of the United States into other and different states.

That the said Mern G. Welker was at the time of his death, years of age; that his earning capacity was at that time about \$125.00 per month, and that he was an able-bodied, intelligent,

dustrious man, in good health, of exemplary habits and had prospects of promotion and of a long life and great usefulness.

That the family of said Mern G. Welker consisted and consists of Bessie G. Welker, his wife, now his widow, and Marthella Welker, his infant child of the age of — weeks; that the said Bessie G. Welker, his wife, and Marthella Welker, his infant daughter, were wholly dependent upon him for support and that up to the time of his death, as herein mentioned, the said Mern G. Welker had provided for the support and maintenance of his said wife and infant daughter and had contributed to their support about \$100 per month, and that the said wife of said Mern G. Welker during her life and the said child of the said Mern G. Welker during her minority had a right and were entitled to their maintenance, care and support and to such contribution thereto, as aforesaid, by their said husband and father, and would have received the same but for the fact that he was negligently killed by defendant as herein stated, and that the said infant daughter of said Mern G. Welker had a right to and would have received, during her minority, the care, attention, instruction, training, advice and guidance of her said father had he not been killed by the negligence of the defendant, as aforesaid.

Plaintiff states that she is prosecuting this action under the Federal Employers' Liability Act, an Act of Congress approved April 22d, 1908, as amended April 5th, 1910, and that this section arises and accrues under said Act of Congress.

Wherefore, plaintiff says that the said widow and infant child of the deceased, Mern G. Welker, and this plaintiff as administratrix have been damaged to the amount of one hundred thousand dollars, for which sum with her costs she prays judgment.

MILES ELLIOTT,  
*Attorney for Plaintiff.*

No. 22737.

Filed June 5th, 1918.

DREW P. TYE,

*Circuit Clerk.*

And which said summons so offered and introduced in evidence by Movant, is in the words and figures following, to-wit:

*Original Writ.*

STATE OF MISSOURI,

*County of Livingston, ss:*

The State of Missouri to the Sheriff of Livingston County, Greetings:

We command you to summon Wabash Railway Company, a corporation, to be and appear in the Circuit Court of Livingston County, before the Judge thereof, on the first day of the next term of Court to be begun and held at the Court House, in the City of Chillicothe,

in Livingston County, on the First Monday in September, at 8 a. m., 1918, it being the 2nd day of September, A. D. 1918, to answer the petition of Bessie G. Welker, Administratrix of the Estate of Mern G. Welker, deceased, and have you then and there this writ with the manner in which you executed the same.

48 In witness whereof, I Byrd L. Hamblin, Clerk of said Court, hereunto set my hand and affix the seal of said Court at my office in Chillicothe, this the 5th day of June, A. D. 1918.

[SEAL.]

DREW P. TYE,

Clerk

*Sheriff's Return.*

Served the within summons in Livingston County, Missouri, the 10th day of June, 1918, by leaving a true copy of the writ, with a copy of the petition thereto attached, as furnished the Circuit Clerk of Livingston County, Missouri, with W. R. Stepp, agent of the Wabash Railway Company, the within named corporation, defendant, at the office of the defendant in Chillicothe, Livingston County, Missouri, the said W. R. Stepp being the agent and person in charge of the business office of the defendant in Chillicothe, Missouri, the President or other chief officer not being found in my County.

JAMES J. BROWN,

*Sheriff of Livingston County, Missouri.*

Fee \$1.00.  
No. 22757.

Filed June 10, 1918.

DREW P. TYE,

*Circuit Clerk.*

49 Here at the request of Movant, the Notice to the Wabash Railway Company herein was by the Reporter marked Exhibit Two.

By Mr. Elliott: Movant offers in evidence the Notice marked Exhibit Two, together with the Sheriff's return of service thereon.

By Mr. Jones: Defendant Wabash Railway Company, objects to the introduction of Exhibit Two in evidence for the reason that it is not shown that it was served on any agent of the Company, for the reason that at the time of said service of said notice the Wabash Railway Company did not have an office or place of business in charge of an agent at the time of the service of said notice, for the further reason that at the time of the service of said notice the Railway property, rights and franchises of said Wabash Railway Company were in the possession of and under the sole control and operation of the Federal Government.

By the Court: Objection over-ruled.

To which action and ruling of the court the defendant, Wabash Railway Company, by counsel, then and there duly excepted at that time and still excepts.

50 By Mr. Jones: The defendant, Walker D. Hines, objects to the introduction of Exhibit Two, for the reason that it is now shown that he had any knowledge of the same or of the contract referred to in said notice.

By the Court: Which said objection to the introduction of said notice is by the court over-ruled.

Which said Notice, Exhibit Two, so offered and introduced in evidence, together with all endorsements thereon, in in the words and figures following:

### EXHIBIT TWO.

"To the Wabash Railway Company, a corporation:

You are hereby notified that Bessie G. Welker, duly appointed by the Probate Court of Shelby County, Missouri, administratrix of the estate of Mern G. Welker, deceased, has entered into a contract in writing with the undersigned, under date of May 16, 1918, by which she has employed the undersigned to act as her attorney in the prosecution and collection of a claim for damages against the Wabash Railway Company, a corporation, for the wrongful death of the said Mern G. Welker, occasioned by the said railway at Shenandoah, Iowa, on the 2nd day of April, 1918, the said Mern G.

51 Welker being then and there in the employ of said railway company as a brakeman, and his death having been occasioned by the negligence of said railway, its agents and servants, while he was so employed, and that by said contract the said Bessie G. Welker has agreed and contracted to pay me as compensation for representing her as her attorney in the said claim for damages fifty per cent of any and all amounts that may be recovered on account of the said death of the said Mern G. Welker, be the same collected by her as such administratrix or in any other capacity, whether the same be by suit, compromise, settlement or judgment.

Dated at Chillicothe, Missouri, this 23rd day of May, 1918.

MILES ELLIOTT,

*Attorney at Law."*

### *Return.*

Served the above notice on the Wabash Railway Company in Livingston County, Missouri, on the 24th day of May, 1918, by leaving a true copy of the same at the business office of said railway company in Chillicothe, Missouri, with W. R. Stepp, the agent and person in charge of said office; and I hereby certify that the President or other chief officer of said railway company could not be found in my county.

JAMES J. BROWN,

*Sheriff."*

52 By Mr. Elliott: Movent offers in evidence the record entry made in this cause of Bessie G. Welker, Administratrix, vs. The Wabash Railway Company, at page 107 of Book 48, of this

court for the sole purpose of showing that the stipulation of dismissal was filed in this court by the defendant, Wabash Railway Company.

Which said record entry so offered and introduced in evidence, together with all endorsements thereto, is in the words and figures following, to-wit:

"First Day, January Term, Monday, Jan. 6, 1919.

No. 22737.

"BESSIE G. WELKER, Admrx., Plaintiff,

vs.

WABASH RY. CO., Defendant.

Stipulation for dismissal filed by defendant, through its counsel.

By Mr. Elliott: Now, for the purpose of showing the authority of C. G. Williamson as agent of the Wabash Railway Company at the time of the making of the alleged settlement and for the purpose of showing that the Wabash Railway Company made said settlement by its agent, movant offers in evidence the stipulation for dismissal filed in this court January 6, 1919.

Which said stipulation for dismissal, so offered and introduced in evidence, is in the words and figures following, to-wit:

53 "In the Circuit Court of Livingston County, Missouri, to be  
— Term, 1918.

BESSIE G. WELKER, Administratrix Estate of Mern G. Welker,  
Deceased,

vs.

WABASH RAILWAY COMPANY.

The subject matter of the above entitled suit having been fully settled between the parties hereto, it is hereby stipulated and agreed that said suit be dismissed at defendant's cost.

BESSIE M. WELKER,

*Administratrix Estate of Mern G.*

*Welker, Deceased, Plaintiff*

WABASH RAILWAY COMPANY,

*Defendant*

By C. G. WILLIAMSON,

*Its Counsel.*

By Mr. Elliott: Movant now offers in evidence the direct examination of the deposition of Bessie Welker Hampton, taken in the cause on the 20th day of December, 1919, by agreement of the parties, and filed in this Court December 27, 1919.

Which said deposition, omitting a duly executed notice and agreement of the parties, so offered and introduced in evidence, is  
54 in the words and figures following, to-wit:

"In the Circuit Court of Livingston County, State of Missouri.

BESSIE G. WELKER, Admrx. of Estate of Mern G. Welker, Deceased,  
Plaintiff,

vs.

WABASH RAILWAY COMPANY and WALKER D. HINES, U. S. Director  
General of Railroads, Defendant: Miles Elliott, Movent and Petitioner.

Deposition of witness, produced, sworn and examined on the 20th  
day of December, in the Year of our Lord One Thousand Nine  
Hundred and Nineteen, between the hours of eight o'clock in the  
forenoon and six o'clock in the afternoon of said day, at the law  
offices of Kelly, Buchholz, Kimbrell & O'Donnell, 307-312 Searritt  
Building, in Kansas City, Missouri, before Helen Hull, a Notary  
Public within and for Jackson County, Missouri, in a certain cause  
now pending in the Circuit Court of Livingston County, Missouri,  
between Bessie G. Welker, Admrx. of estate of Mern G. Welker,  
deceased, plaintiff, and Wabash Railway Company and  
55 Walker D. Hines, U. S. Director General of Railroads, defendants, and Miles Elliott, Movent and Petitioner, on the  
part of Miles Elliott.

*Appearances:*

Plaintiff appeared in person.

Defendants appeared by S. J. Jones, counsel.

Miles Elliott appeared by M. J. O'Donnell, counsel.

*Stipulation.*

This deposition is being taken by agreement of the parties, notice  
being waived, defendants reserving the right to urge all jurisdictional  
questions, none of which are waived.

MILES ELLIOTT,  
N. S. BROWN,  
W. W. DAVIS,  
S. J. & G. C. JONES,  
*Attorneys for Defendants.*

BESSIE WELKER HAMPTON, of lawful age, being produced, sworn and examined on the part of Miles Elliott, deposeseth and saith:

56 Direct examination.

By Mr. O'Donnell:

Q. What is your full name?

By the Witness:

A. My name now?

Q. Your present name?

A. My husband's name?

Q. Your own name now?

A. Bessie Welker Hampton.

Q. And where do you live at this time?

A. Fowler, Colorado.

Q. What was your former name, your name before you were married to Mr. Hampton?

A. Bessie Welker.

Q. You were married before you married Mr. Hampton?

A. Yes.

Q. And what was your former husband's name?

A. Merne G. Welker.

Q. And where did you live at the time of his death?

A. Shelbina, Missouri.

Q. What was his business?

A. Brakeman on the railroad.

Q. On the Wabash Railroad?

A. Yes.

Q. And about when did he die?

A. April 2, 1918?

57 Q. And you may state whether or not you ever filed a suit against any railroad company to recover damages for his death?

A. I did.

Q. And do you know Mr. Miles Elliott of Chillicothe?

A. I do.

Q. You may state whether or not you retained or employed Mr. Elliott to bring that suit for you?

A. Yes, I did.

Q. And you entered into a contract with Mr. Elliott for his fee?

A. Yes.

Q. Under that contract he was to receive what proportion of the proceeds?

By Mr. Jones: We object to that for the reason that the contract is the best evidence.

By the Court: Sustained.

By the Witness:

A. (Not read to the court.) Fifty per cent.

Q. As I understand you, he was to receive under the contract mention one-half of whatever you recovered?

By Mr. Jones: Objected to as leading and because the contract is best evidence.

By the Court: Sustained.

By the Witness:

A. (Not read to the court.) Yes, sir.

By Mr. O'Donnell:

Q. Now, you may state whether or not the amount that Mr. Elliott was to receive under the contract embraced the proceeds of litigation in any form?

By Mr. Jones: Objected to for the reason that the contract is the best evidence and for the further reason that it is not proper for the witness to interpret the meaning of the contract.

By the Court: Sustained

By Mr. O'Donnell:

Q. I will put it in another form and with-draw that other question. You may state whether or not your agreement with Mr. Elliott contemplated his receiving one-half of whatever you got, either by settlement or by judgment?

By Mr. Jones: I make the same objection.

By the Court: Sustained.

Answer not read to the court.)

By Mr. O'Donnell:

Q. You may state whether or not you ever received anything from the Wabash Railroad or anybody representing that road in settlement of your law suit?

By the Witness:

I received \$4,000.00.

And from whom did you receive \$4,000.00?

Mr. Williamson, claim agent.

Do you know Mr. Williamson's initials?

C. D.

By Mr. Jones: It is "C. G."

By Mr. O'Donnell: Do you admit, Mr. Jones, that the Wabash paid \$4,000.00 to the witness?

By Mr. Jones: I do not. On the contrary, I deny it.

By Mr. O'Donnell:

Q. Who is Mr. C. G. Williamson?

A. Claim Agent for the Wabash Railroad.

Q. And how do you happen to know his occupation?

A. He was——

Q. Well, you may state whether or not he said anything about representing the Director General of Railroads at the time or the Wabash?

60 By Mr. Jones: Question objected to because it is incompetent, calls for hear-say testimony and any statements or conversations wouldn't be binding on the Wabash Railroad or the Director General.

By the Court: Sustained.

(Answer not read to the court.)

By Mr. O'Donnell:

Q. Now, when he paid you, in what form was this payment made?

By the Witness:

A. Bank draft.

Q. Do you recall how that bank draft was signed?

A. I do not.

Q. Do you know whose name was appended to it?

A. No.

Q. And what did Mr. Williamson say at the time, if anything concerning your attorney, Mr. Elliott? Did Mr. Williamson, as claim agent, say anything about Mr. Elliott's compensation to you?

A. No. I don't understand what you mean, I suppose.

Q. What did he say about paying Mr. Elliott.

By Mr. Jones: Objected to for the reason that any conversation between her and Mr. Williamson wouldn't be binding on the Wabash Railway Company or the Director General in charge of the Wabash Railway.

61 By the Court: Over-ruled.

To which action and ruling of the court the defendants' counsel, then and there duly excepted at the time and still except.

By the Witness:

A. He said that the \$4,000.00 was mine and he would pay my lawyers.

By Mr. O'Donnell:

Q. You may state whether or not he asked you anything about the terms of the contract or how much, what part of the proceeds was to go to your lawyer?

A. He did.

By Mr. Jones: Objected to for the reason that it is incompetent, and is not shown he had authority to make any agreement as to attorney fees.

By the Court: Over-ruled.

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

By Mr. O'Donnell:

Q. What did you tell him about what part of the proceeds would go to your lawyers?

62 A. I told him fifty per cent.

By Mr. Jones: The same objection.

By the Court: Over-ruled.

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

By Mr. O'Donnell:

Q. When you told him your attorney was to receive one-half, what did he then say to you?

By the Witness:

A. He said he would pay the lawyers, the attorneys.

Q. And what did he say about the amount that you received as to what should be done with it?

By Mr. Jones: Objected to for the reason that it is leading and suggestive and incompetent besides.

By the Court: Over-ruled.

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

63 By the Witness:

A. Said I should put it in the bank and use it as my own.

By Mr. O'Donnell:

Q. So that the objection that it is leading will not be involved, I will ask the question in another form. You may state what, if anything, Mr. Williamson said to you when you received the bank draft as to whether or not this \$4,000.00 was your own?

By Mr. Jones: Objected to for the same reasons and for the reason that it won't be binding on either of the defendants, no authority being shown to make such agreement.

By the Court: Over-ruled.

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

By Mr. O'Donnell:

Q. In your own language, state what it was that he said about that \$4,000.00 when he gave it to you, in your own way; that is, as to whether it was your lawyer's, your own, or whose it was?

By Mr. Jones: The same objection.

64 By the Court: Overruled.

To which action and ruling of the court the defendant by counsel, then and there duly excepted at the time and still except.

By the Witness:

A. He said it was my own and that he would pay the lawyer that I shouldn't divide it up or anything like that.

By Mr. Jones: It may be understood that the same objection applies to the same line of questions without my repeating them.

By Mr. O'Donnell:

Q. Mrs. Hampton, what, if anything, in addition to the \$4,000.00 did the Claim Agent agree to pay?

By Mr. Jones: The same objection.

By the Court: Over-ruled.

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

By the Witness:

A. He agreed to pay the funeral expenses.

By Mr. O'Donnell:

Q. And did he?

65 A. He did.

Q. And how much were they?

A. \$162.85.

Q. You may state whether or not you signed a release of your claim or cause of action at the time you were paid this \$4,000.00. I will withdraw that question. You may state whether or not you signed any papers?

A. I did.

Q. And about how many?

A. One.

Q. And do you know what that paper was?

A. I don't.

Q. Would it refresh your recollection any if I would call your attention to the fact that it was a release or something of that nature?

A. What I supposed it to be.

Q. Did you read it?

A. No, I didn't.

Q. You just signed whatever paper he gave you?

A. Yes.

Q. Well, what did he represent it to be; what did he tell you was?

A. I suppose it was a release; I don't know what he told me it

was. I don't believe he even told me.

By Mr. O'Donnell: That is all.

By Mr. Jones: We will read the cross-examination.

Cross-examination.

By Mr. Jones:

Q. Did you write a letter to the Director General of Railroads Washington and ask them to settle this claim for you?

By the Witness:

A. I did not.

Q. Did you have any one to do that?

A. I did not.

Q. Did you ask your mother to?

A. No, sir.

Q. Where did your mother live at the time of your husband's death?

A. You mean my mother or my mother-in-law?

Q. Your husband's mother, I meant?

A. Shelbina, Missouri.

Q. Did you have your mother-in-law write?

A. No.

Q. Did she write?

A. She wrote.

Q. Did you know she was going to write?

A. I was out on the farm, I didn't know it; out on the farm at Shelbina with my own parents.

Q. Did you see the letter before she mailed it?

A. No.

Q. When did you first know that she was going to write the letter?

A. After she had done written it. I came to town one day and she told me she had written it.

Q. Did you have any knowledge whatever that she was going to write that letter?

A. No.

Q. Had you and her talked about taking the matter of settlement up with the railroad or Director General of Railroads before the letter was written?

A. She said something about it. She didn't consult with me about writing the letter though.

Q. Well, you and her talked about the advisability of trying to settle it through the Director General?

A. She did; I didn't.

Q. Did you consent for her to write the letter?

A. No; I didn't tell her what to do.

Witness excused.

(Signed)

BESSIE WELKER HAMPTON.

Subscribed and sworn to before me this 20th day of December 1919.

My commission expires May 31, 1921.

[SEAL.]

HELEN HULL,

*Notary Public Within and for Jackson County, Mo.*

STATE OF MISSOURI,

*County of Jackson, ss:*

I, Helen Hull, a Notary Public within and for the aforesaid County and State, do certify that in pursuance of an agreement between the counsel for the respective parties hereto there came before me Bessie Welker Hampton, who was by me duly sworn to testify to the truth, the whole truth and nothing but the truth of her knowledge touching the matter aforesaid, that she was examined and her examination reduced to writing and subscribed by her in my presence, on the day, between 10 hours and at the place in that behalf last aforesaid, and her deposition is herewith returned.

In testimony whereof, I have hereunto set my hand and notary seal this 20th day of December, 1919.

My commission expires May 31, 1921.

[SEAL.]

HELEN HULL,

*Notary Public Within and for Jackson County, Missouri.*

Filed Dec. 27, 1919.

BYRD L. HAMBIN,

*Circuit Clerk.*

By Mr. Elliott: For the purpose only of showing notice to defendants of the pendency of the suit of Bessie Welker, Admx vs. Wabash Railway Company, movent offers in evidence the deposition of Roy Floyd taken in the case of Bessie G. Welker, Admx vs. Wabash Railway Company, on the 27th day of January 1918.

By Mr. Jones: Defendant Walker D. Hines objects to the offer for the reason that it is not binding on him and does not show any notice as to him.

By the Court: It is admissible in evidence even though it is not binding on the Director General of Railroads; the objection is, therefore, over-ruled; its legal effect will be passed upon later.

By Mr. Jones: In this connection the defendants offer the

action on page one of the deposition as made by S. J. Jones at the time the deposition was taken, for the purpose of showing that at that time the jurisdiction of this court over the defendant Wabash Railway Company and the cause of action therein alleged was attacked and denied.

By Mr. Jones: Mr. Elliott, it is admitted that no cross-examination was indulged in by any attorney representing the Wabash Railway Company at the time the deposition was taken.

By Mr. Elliott: Yes, sir; that is admitted.

To which action and ruling of the court in admitting said deposition in evidence, the defendants, by counsel, then and there duly excepted at the time and still except.

Which said deposition of Roy Floyd, so offered and introduced in evidence, is in the words and figures following, to-wit:

"In the Circuit Court of Livingston County, State of Missouri,

BESSIE G. WELKER, Administratrix of the Estate of Mern G. Welker,  
Deceased, Plaintiff,

VS.

WABASH RAILWAY COMPANY, Defendant.

Deposition of witness, produced, sworn and examined on the 27th day of June, A. D. 1918, between the hours of eight o'clock in the fore-noon and six o'clock in the afternoon of that day, at the Circuit Court Room in the County Court House in the City of Chillicothe, in the County of Livingston, and State of Missouri, before me, Walter R. Le Compte, a Notary Public, within and for the County of Livingston and State of Missouri, in a certain cause now pending in the Circuit Court of Livingston County, State of Missouri, between Bessie G. Welker, Administratrix of the Estate of Mern G. Welker, deceased, plaintiff, and Wabash Railway Company, defendant, on the part of the plaintiff.

ROY FLOYD, a witness, of lawful age, being produced, sworn and examined as a witness upon the part of plaintiff, deposeth and saith:

Direct examination.

By Mr. Jones:

Defendant appears at this time and place for the sole and only purpose of objecting to the taking of depositions on the part of plaintiff in pursuance of the notice heretofore served upon defendant, for the reason that the Circuit Court of Livingston County, Missouri, has no jurisdiction of the cause of action sued on in this case, and for the further reason that the Circuit Court of Livingston County, Missouri, has no jurisdiction over the defendant, it appears

ing from the face of the petition on file in this case that plaintiff is a non-resident of Livingston County, Missouri, and was appointed administratrix of the estate of Mern G. Welker, deceased, by the Probate Court of Shelby County, Missouri; and for the further reason that it appears on the face of the petition that the pretended cause of action accrued in the State of Iowa.

By Mr. Elliott:

Q. Your name is Roy Floyd?

By the Witness:

A. Yes, sir.

Q. Where do you live?

72 A. Stanberry, Missouri.

Q. By whom were you employed on the second day of April, 1918?

A. By the Wabash Railroad Company.

Q. In what capacity were you employed at that time?

A. In the train service as brakeman.

Q. Did you know Mern G. Welker?

A. No, sir.

Q. On the 2d day of April, 1918, between what points did you run as brakeman on the Wabash Railroad?

A. Between Stanberry, Missouri, and Council Bluffs, Iowa.

Q. What was the number of your train, do you recall?

A. I believe it was Extra No. 2159, but I am not sure that that was the number of the engine.

Q. Was it a freight or passenger?

A. A freight.

Q. Were you head brakeman or rear brakeman on that train?

A. Rear brakeman.

Q. Who was the head brakeman?

A. I didn't know what the fellow's name was until after he was killed, when I found out it was Welker.

Q. You say on that run the head brakeman was killed?

A. Yes, sir.

Q. What did you afterwards find out to be his name?

A. M. G. Welker.

Q. Where was he killed?

73 A. At Shenandoah, Iowa.

Q. Where was he killed with reference to the station at Shenandoah; how far from the station?

A. About two hundred yards west.

Q. Was he or was he not at that time within the Shenandoah yards?

A. He was.

Q. From what point did you and Welker run and to what point?

A. From Stanberry, Missouri, to Council Bluffs, Iowa.

Q. Between what points did the train on which Welker was employed run on that occasion.

A. From Stanberry, Missouri, to Shenandoah, Iowa, and from Shenandoah to Council Bluffs, Iowa. We were called to go from Stanberry to Council Bluffs.

Q. What time of day did the train reach Shenandoah, Iowa?

A. Between two and three o'clock in the morning; A. M.

Q. What time did you leave Stanberry?

A. I don't know; it seems to me we were called at nine o'clock.

Q. About how many cars were in the train that night?

A. About fifteen.

Q. Who was the Conductor on that train?

A. William Fox.

Q. Who was the engineer?

A. Frank Munger.

Q. Who was the fireman?

A. Cummings is all I know of his name.

Q. Where did all of them live?

74 A. Stanberry, Missouri.

Q. In what State?

A. Missouri.

Q. State whether or not that entire train crew and the train on which they were employed ran from Stanberry, Missouri, to Council Bluffs, Iowa, that night or day?

A. The train and crew was called and our run was from Stanberry to Council Bluffs.

Q. How long, if at all, before that run had you seen this man Welker?

A. Approximately from five to ten minutes.

Q. Had you or had you not ever seen him before that day?

A. No, sir.

Q. How long, if you know, had Welker been running on the Wabash Railroad and and on that particular division of the Wabash Railroad?

A. He told me it was his first trip.

Q. How many times, if at all, had you seen him at work on the Wabash on that division before that?

A. I never saw him before we were called for that run that evening.

Q. State if you know whether or not the cars on that train were moved from the State of Missouri into the State of Iowa?

A. Our train was made up at Stanberry, Missouri, and was carried as far as Shenandoah, Iowa; that is where the accident happened.

Q. What became of the engine and caboose at Shenandoah after the accident?

A. We made up our train and went to Council Bluffs.

75 Q. What do you mean by "making up" the train?

A. Getting the cars off of different tracks and putting them

together.

Q. Was your run from Stanberry, Missouri, to Council Bluffs, Iowa, with that train one continuous run or was it two separate runs?

A. One continuous run.

Q. Now, when you reached Shenandoah, Iowa, state in your own way what movements were made by your train and what happened?

A. While we were at Shenandoah we received orders to set out part of our train and pick up more cars for Council Bluffs or west of Shenandoah; the house track and the elevator track were full of cars; we left our train on the siding and we had to pick up cars off the house track and the elevator track to make room for our train and what cars we were to set out.

Q. Mr. Floyd, state whether or not you could make a rough diagram on a sheet of paper showing the various tracks in the Shenandoah yards and their locations with reference to each other, and particularly in the west part of the yards, the switch stands and the switches in the west part of the yard there at Shenandoah?

A. I can.

Q. I wish you would draw such a plat to be attached to your deposition?

(Witness draws plat of Wabash yards at Shenandoah, Iowa, which is marked by the Notary as Exhibit One and attached to the deposition of witness.)

76 Q. Mr. Floyd, the plat which you have drawn which the Notary has marked Exhibit One, shows the relative location of the tracks in the yards at Shenandoah, Iowa, with reference to each other and the general directions of the tracks in those yards, is not?

A. That is a correct plat as to my knowledge. (Referring to plat Exhibit One.)

Q. I observe that you have indicated on this plat, Exhibit One, four tracks, the house track, the main line, the side track and the elevator track; which of those tracks is the north track?

A. The old elevator track.

Q. Which track is next south of the old elevator track?

A. The passing track.

Q. The passing track that you have designated as the side track on the plat, Exhibit One?

A. Yes, sir.

Q. What track is next south of the side track?

A. The main line.

Q. On which side of the depot is the main line?

A. On the south.

Q. You mean the depot is south of the main line?

A. Yes, sir.

Q. The main line is north of the depot?

A. Yes, sir.

Q. What is the next track south of the main line?

A. The spur track running into the coal chutes.

Q. What track is south of that?

A. The house track.

Q. On which side of the depot is the house track?

A. On the south.

77 Q. When your train ran into the Shenandoah yards on that occasion, upon which track did it first run?

A. We headed in at the east end of the passing track.

Q. And went upon that track?

A. Yes, sir.

Q. Then what did you do?

A. We waited until we found out from the conductor what our orders were.

Q. After finding out what your orders were, what did you do?

A. We looked over the yards to see if we had a place to set our train and upon finding there was no room we then decided to make up part of our new train on the main line so as to make room for the cars which we had to set out.

Q. Then what did you do?

A. We cut the engine off of the train and began to work the house track.

Q. When you cut your engine off of the train which way did the engine run?

A. West.

Q. On to what track?

A. We headed west on to the main line.

Q. Then what did the engine do?

A. We came back in on the house track.

Q. What, if anything, did you do on the house track?

A. We picked up what cars there was on the house track as far back as the last three cars which we wanted.

Q. Then what did you do?

78 A. We pulled out on the main line and I told Mr. Welker to shove the cars on the main line far enough to clear and leave room for a few more.

Q. How many cars, if any, did you set out on the main line?

A. Three.

Q. What kind of cars were they?

A. I believe there was two coal cars and a box car.

Q. What kind of a car was the west car of those three?

A. A coal car.

Q. After setting those three cars out on the main line what did you do?

A. I left Welker to set the brakes and I remained at the switch.

Q. What did he with reference to setting the brakes?

A. He gave them slack, cut the train in two and signaled me ahead. Then Welker went back and went between the cars apparently to set the brakes.

Q. Between what cars did he go?

A. I presume that he went between the first and second cars of the west cars.

Q. On which end was the brake of that car?

A. The east end.

Q. Then where did Welker go after he came out from between those cars?

A. He ran back to where I was at the switch.

Q. Then what happened?

A. And I told Welker that I would ride the cars in on the house track so that I could spot them at the street or wagon crossing and for him to get on six or seven cars behind me so that he could

79 give signals while we were going around the coal chutes we had pushed in on the house track in the neighborhood

of two or three car lengths or possibly some further; I looked back to see if I could see Welker and he was still at the switch, and in looking back it seemed that I could see the shadows of the cars that were on the main line running back towards the train.

Q. By "towards the train" which direction do you mean?

A. West.

Q. Go ahead and tell what happened?

A. And upon seeing same I signaled to Welker to stop.

Q. What did Welker do?

A. Welker caught the signal and that was the last I saw of him.

Q. By "caught the signal" what do you mean?

A. I mean that I gave the signal and he answered the signal the same as I gave it.

Q. By doing what?

A. By signaling the stop signal.

Q. To whom?

A. To the engineer and also to myself.

Q. State whether or not the engineer could have seen Welker's stop signal from the position in which he was there about the switch?

A. The engineer could see the switch plainly and also Welker. And upon giving the stop signal I ran to the main line under the coal chutes and when I got to the main line the three cars which were on the main line were running east on account of the jar which they received.

80 Q. The jar that they received from what?

A. From side swiping the cars we were shoving in on the house track.

Q. What did you do then?

A. I ran to the first car and started to apply the brake but the brake wheel was tight.

Q. By "tight" what do you mean?

A. It was set.

Q. What happened then?

A. I got off the first car and ran to the second car and set the brake on that and that stopped the three cars on the main line.

Q. State whether or not these three cars on the main line stopped before or after you set the brake on the second car?

A. They stopped after I set the brake on the second car, the middle car.

Q. State what they did as to stopping or continuing to move before you set the brake on the second car; did they continue to move or did they stop?

A. They were still moving until I set the brake on the second car.

Q. Then what did you do?

A. At that time the conductor was signaling the stop signal from somewhere about the depot and I remained at the three cars until Mr. Fox came up.

Q. Who was Mr. Fox?

A. He was the conductor.

Q. After you gave the stop signal to Welker and Welker gave the stop signal, about how far if any distance did the train continue to move east on to the house track before the collision?

SI A. As I gave the signal and Welker answered the signal I left and I judge it was in the neighborhood of 75 to 100 feet.

Q. About how fast was the train running in on the house track?

A. I couldn't tell as it was dark.

Q. Was it going slow or fast?

A. Well, it was going, I judge, not over six or eight miles per hour, if that.

Q. Go ahead and tell what happened after Mr. Fox came back there where you were by the three cars on the main line?

A. When Mr. Fox came to the three cars on the main line where I was, he said, "This is a bad time to be setting brakes after an accident has happened." I said to him, "The brakes on the head car were set and not checking the cars and I immediately went to the center or second car." Then Mr. Fox and I went down to see what the trouble was and we found the stock car was side swiped and one side smashed.

Q. Where was this stock car?

A. The stock car was standing at that time on the switch which was leading to the coal chutes.

Q. To what other place, if any, did that switch lead?

A. To the house track.

Q. State whether or not that stock car was a part of the train that you were backing in on the house track?

A. It was a part of the train.

Q. Go ahead Mr. Floyd, and tell what else happened?

SI A. Then Mr. Fox and I looked around and not seeing Welker and not seeing his lamp we hollered for him a few times and upon getting no answer or signal from him we began to look, and upon arrival at the stock car we saw Mr. Welker hanging by his knees on the west end of the car.

Q. The west end of the stock car?

A. Yes, sir; with his head hanging down among the wreckage of the car.

Q. Was he dead or alive?

A. We looked at him with a lantern and we judged he was dead and called the Coroner.

Q. State what, if any, evidence you noticed on any other car except this stock car of having been struck by other cars there by these three cars?

A. Nothing only the west end of the coal car, which was damaged slightly.

Q. The first coal car; the coal car was east or west of the stock car?

A. It was the coal car on the main line.

Q. What did you notice on it?

A. The west corner was damaged slightly.

Q. What, if anything, did you notice with reference to the car on the train on the house track east of the stock car on which Welker was hanging?

A. Nothing only that the car had started to side swipe that first car east of the stock car, by catching the corner and tearing off one hand-hold.

Q. What, if any, marks did you observe on the corner of this first car east of the stock car that would indicate or tend to indicate it had been struck by these cars running down the main line?

S3

A. By a few bolt scratches on the north side of the west end, and also one hand-hold on the west end of the stock car was knocked off.

Q. Now, Mr. Floyd, after you found Mr. Welker's body hanging on that stock car, what, if any, observation did you make of the brakes of the west car of the three cars that had run down the main line and cornered the car on which Welker was riding, and what, if anything, did you discover on that car with reference to the brakes or braking apparatus thereon?

A. I made no discovery on the car until—I presume it was the Coroner or the Sheriff that was there—said that the brakes were never set on the car, as they were at least one or one and one inches away from the wheels.

Q. Don't tell what the Coroner or Sheriff said, but tell what you saw at that time, if anything, with reference to the brake shoes on that car?

A. I looked at the car closely with my lamp and it was dark. I couldn't see very well, and while I was looking the car over, I suggested that we would carry the body to the depot. I paid more attention to the car until after we held the Coroner's inquest and we came back on the track immediately after, which was in light, and shoved our train in the clear, and while we were waiting for a relief brakeman to come out on the passenger, I was looking over the cars.

Q. What did you find then on that west car of those three that had run down the main line, as you have narrated?

A. It appeared as though the chain rod and plunger of the air cylinder was stuck or that the brake beams were stuck so that they couldn't come in contact with the wheels. (The chain was tied and the "dog" was set).

Q. You mean the chain and dog on the break staff?

A. Yes, sir.

Q. What, if anything, did you notice in regard to the brake shoes on that car, as to whether they set against the wheels or not?

A. The shoes were not against the wheels.

Q. How far were they away from the wheels?

A. I judge from one-half to one inch.

Q. What, if anything, did you notice with reference to the piston rod and the air drum on that car?

A. When the brake chain was tight the piston appeared to be stuck in the cylinder.

Q. What is the cylinder?

A. That is your air drum located underneath of the car.

Q. What does that do with reference to the brakes, with reference to controlling them?

A. It controls the brakes through the engineer's control of the air at the engine, and upon applying the brakes this plunger will immediately push itself out and that throws the brakes on, and upon releasing the air it will draw itself back into place.

Q. When the brake cylinder and plunger on a car with braking apparatus of that kind are in good condition, how far, if at all, does the plunger stick out of the air cylinder when the brakes are set?

A. From eight to sixteen inches.

85 Q. How far, if at all, did this particular plunger stick out of this air cylinder?

A. It was not out any.

Q. You say it was not out any?

A. No. It was setting in its normal position upon full release of the air.

Q. These cars and these railroad tracks and the train upon which you and Welker were employed at that time were the cars and tracks and train of what railway company?

A. The Wabash Railroad Company.

Q. Of the Wabash Railway Company?

A. Yes, sir.

By the Notary:

Q. Do you consent and request that the Notary may attach the plat or drawing marked Exhibit One to your deposition and make it a part hereof?

By the Witness:

A. I have no objection to that.

By Mr. Elliott:

Q. You do consent that the plat marked Exhibit One and drawn by you may be attached to your deposition by the Notary and made a part of the deposition?

A. Yes, sir

(Signed)

ROY FLOYD.

86 STATE OF MISSOURI,  
County of Livingston, ss:

Subscribed and sworn to before me, on the day, at the place and within the hours first aforesaid.

[SEAL.]

WALTER R. LE COMPTE,  
Notary Public, Livingston County, Missouri.

My Com'n expires March 7, 1920."

Here a check, No. 692 for \$4,000.00, dated November 15, 1918, was by the Reporter marked as Exhibit Three.

By Mr. Elliott: Movent offers in evidence check or draft No. 692 marked Exhibit Three, together with all endorsements thereon.

Mr. Mr. Jones: There is no objection.

By the Court: And the same is considered in evidence.

Which said Exhibit Three, together with all endorsements thereon is in the words and figures following, to-wit:

87 United States Railroad Administration.

W. G. McAdoo, Director General of Railroads.

No. 692.

St. Louis, Mo., Nov. 15, 1918

Pay to Bessie M. Welker, Administratrix Estate of Merne G. Welker deceased, or order, \$4,000.00, Four Thousand and No/100, Dollars

WABASH R. R. FEDERAL ACCOUNT  
F. L. O'LEARY,

Federal Treasurer.

Countersigned:

R. E. BERGER,

Auditor.

To Third National Bank, of St. Louis, Mo."

(Endorsed on back: "Bessie M. Welker, Admx. of Estate Merne G. Welker, deceased.")

Also, "Pay National Bank of Commerce of St. Louis, Mo., Commercial Bank, Shelbyville, Mo."

Paid.")

By Mr. Elliott: "We will Rest."

*Demurrer.*

88 Mr. Mr. Jones: The defendant, Wabash Railway Company, at the close of plaintiff's case, demurs to the evidence; and asks the court to declare as a matter of law that finding, verdict and judgment must be in favor of the defendant, Wabash Railway Company.

By the Court: Which request is denied and the demurrer over-ruled.

To which action and ruling of the court the defendant, Wabash Railway Company, by counsel, then and there duly excepted at the time and still excepts.

By Mr. Jones: The defendant, Walker D. Hines, Director General of Railroads at the close of plaintiff's evidence demurs to the evidence introduced, and asks the court to declare as a matter of law that the finding, verdict and judgment must be in favor of the defendant, Walker D. Hines, Director General of Railroads.

By the Court: Which request is denied and the demurrer over-ruled.

To which action and ruling of the court the defendant, Walker D. Hines, Director General of Railroads, by counsel, then and there duly excepted at the time and still excepts.

89 Thereupon, the defendants, to maintain the issues upon their parts, offered and introduced the following evidence, to-wit:

W. R. STEPP, a witness, of lawful age, being first duly sworn, and being called as a witness upon the part of the defendants testified as follows, to-wit:

Direct examination.

By Mr. Jones:

Q. State your name, please?

By the Witness:

A. W. R. Stepp.

Q. Where do you reside?

A. Here in Chillicothe.

Q. How long have you resided in Chillicothe?

A. Over twelve years.

Q. Then you resided in Chillicothe on June 5, 1918?

A. Yes, sir.

Q. And also on June 16th of that year?

A. Yes, sir.

Q. What business were you engaged in at that time?

A. I was freight and pas-enger agent at that time.

Q. For whom?

90 A. Well, it was for the Wabash Railway Company until the Government took it over.

Q. Had the Government taken it over then?

By Mr. O'Donnell: We object, if the court please; that is a question that the court will take judicial notice of.

By the Court: Over-ruled.

By Mr. Jones:

Q. Who was operating the Wabash Railroad at that time?

By the Witness:

A. The Federal Government.

By Mr. Elliott: We object to that as a conclusion of law and move to strike it out.

By the Court: It might be a conclusion of the witness.

By Mr. Jones:

Q. By whom were you paid?

By Mr. O'Donnell: We object as immaterial to the issues in the case; the return of the Sheriff shows that Wabash Railway Company was served.

91 By the Court: I do not know that I see the object of the testimony or where it is material.

By Mr. Jones: I would like to get it in the record anyway. Does that mean that the objection is sustained?

By the Court: It seems to me that it is not material, but I will request you to state the object of it so that the court may determine whether or not it is material.

By Mr. Jones: It is to show that there was no officer or agent of the Company here in charge of the office by which jurisdiction could be obtained over the Wabash Railway Company who could be served.

By the Court: Wouldn't that be an effort to contradict the Sheriff's return?

By Mr. Jones: I don't know; I expect it is.

By the Court: Then under the case of *Snoot vs. Judd*, 184 Mo. 508, that would be incompetent.

By Mr. Jones: I will make it in the form of an offer. Defendant offers to prove by the testimony of this witness that on June 5, 1918, at the time this suit was filed and process issued and on June 10, 1918, at the time that process or the original writ was served on this witness that he was not agent of the Wabash Railway Company; that at that time the properties and rights of the Wabash Railway Company and its former office in the City of Chillicothe and the office which he was agent and in charge of was under the control and management of the Federal Government and the Director General of Railroads; that he was paid salary by the Federal Government and his checks were so drawn.

By Mr. O'Donnell: We object to the offer for the reason that the Sheriff's return shows that the witness was agent of the Wabash Railway Company on the dates mentioned; and for the further reason that it does not make any difference if some agent of the Government had taken over some assets of the railway the corporation still existed and this gentleman would be its agent; and for the further reason that it is an effort to contradict the return of the Sheriff.

By the Court: The court is of opinion, in the absence of fraud, the return of the Sheriff is conclusive and the offer is, therefore, declined.

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

By Mr. Jones:

Q. Do you remember of the fact that the Government took over the railroads?

93 By the Witness:

A. Yes, sir.

Q. I will get you to state what transaction you had, if any, with respect to closing up the business of the Wabash Railway Company at Chillicothe after that?

By Mr. O'Donnell: We object for the reason that it is incompetent and immaterial and is an attempt to contradict the return of the Sheriff.

By the Court: It seems to me that the objection should be sustained if the purpose of the question is the same as that indicated awhile ago; and if there be any other purpose than that indicated awhile ago, I will request counsel to state it.

By Mr. Jones: I will state that after the Proclamation was issued by the President of the United States taking over the railroads under that Act of Congress that the Wabash Railway Company went out of business in Chillicothe as far as the operation of the railroad was concerned; and I want to show by this witness that a short time after that he settled up all the affairs of the Wabash Railway Company in Chillicothe, and my purpose is to show that the Wabash Railway Company was not in business at Chillicothe after that time, had no office here and was not in business here in Chillicothe, for the purpose of showing that the court acquired no jurisdiction of summons and for the purpose of showing that it could not be sued; I offer it for every purpose for which it would be competent.

By the Court: The objection is sustained.

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

Witness excused.

RICE G. MAUPIN, a witness, of lawful age, being first duly sworn, and being called as a witness upon the part of the defendants, testified as follows, to-wit:

Direct examination.

By Mr. Jones:

Q. You may state your name?

By the Witness:

A. Rice G. Maupin.

Q. Where do you reside?

A. At Shelbina, Missouri.

Q. What official position do you hold there?

A. Judge of the Probate Court of Shelby County.

95 Q. Were you such Judge of the Probate Court during the year 1918?

A. I was.

Q. Are you acquainted with Bessie M. Welker?

A. I am.

By Mr. Elliott: She signs it sometimes Bessie G. and sometimes Bessie M.

By Mr. Jones:

Q. State whether or not she consulted you *or consulted you or* called you to see her with reference to her compromising a suit she had against the Wabash Railroad?

By Mr. Elliott: We object as incompetent, irrelevant and immaterial, and nothing she did with Judge Maupin would be binding on this movent.

By the Court: Over-ruled.

By the Witness:

A. She did. I was at my home in Shelbina and she called me to come to her mother-in-law's to see her.

By Mr. Jones:

Q. What did she say.

By Mr. Elliott: We object; this movent was not present and had no notice or knowledge thereof of the conversation and the  
96 would not be binding on the movent in any manner.

By the Court: I am inclined to think the objection should be sustained, but if you have anything to offer in support of your question I will hear it.

By Mr. Jones: They have read her deposition here in which she says there was an agreement to pay attorney's fees and we propose to contradict that.

By the Court: In order to contradict her testimony by statements made by her that were conflicting, she should have been asked that question, the time and place fixed, in litigation between the movent and the railroad company; in litigation between her and the defendants or the railroad company that would not have been necessary but in a controversy solely between Judge Elliott as movent and the defendants in the case in the judgment and opinion of the court her statements made outside of court would be hear-say as far as Judge

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Elliott is concerned, and for impeachment purposes the foundation should have been laid by asking her if she made certain statements, and indicating in the question the time and place when such statements were made.

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

By Mr. Jones: The defendant offers to show by the direct examination of this witness that on the 16th day of November, 1918, that Bessie Welker, Administratrix, stated that she had compromised or could compromise this suit for the sum of \$4,000.00 and sought the advice of this witness about it as Probate Judge of Shelby County, Missouri; and that said \$4,000.00 was the sole consideration for said settlement.

By Mr. Elliott: We object to the offer because no foundation was laid for introducing this evidence for the impeachment of the witness.

By the Court: The objection is sustained and the offer declined for that reason, and for the additional reason that in the opinion of the court her statements as to Judge Elliott would be hear-say.

By Mr. Jones: We offer it for the further purpose of showing what the actual consideration was.

By Mr. Elliott: We object as not binding on the movant in any way and is hear-say as far as movant is concerned.

By the Court: Objection sustained.

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

Here a paper called a release was by the Reporter marked as Exhibit Four.

By Mr. Jones:

Q. I will get you to state whether or not a settlement in writing in this case was signed up in your presence?

By the Witness:

A. It was.

Q. Is this the paper, Exhibit Four, that was signed on that occasion by Mrs. Welker? (Handing witness Ex. 4).

A. It was.

Q. Was it read over in her presence?

A. It was.

Q. Did you and Mr. E. H. Welker sign it as witnesses?

A. Yes, sir.

By Mr. Jones: We now offer Exhibit Four in evidence.

By Mr. Elliott: Movant objects to Exhibit Four because it is in no way binding on this movant, because it would be and was a legal and upon his rights and tends to prove no issue as between this movant and the defendants herein; and movant makes the further

99 objection that if Exhibit Four is offered for the purpose of impeaching the witness, Bessie Welker Hampton, that it is incompetent because no foundation was laid.

By the Court: Without passing upon the legal effect of it, the court will over-rule the objection and the paper may be read and considered in evidence.

Which said Exhibit Four, so offered and introduced in evidence, is in the words and figures following, to-wit:

#### EXHIBIT FOUR.

United States Railroad Administration.

W. G. McAdoo, Director General of Railroads.

Wabash Railroad.

In consideration of the sum of Four Thousand Dollars (\$4,000.00) to me in hand paid by W. G. McAdoo, Director General of Railroads operating the Wabash Railroad, the receipt whereof is hereby acknowledged, I hereby release the said Director General of Railroads and The Wabash Railway Company from all claims and demands at common law, or under the laws of any State or of the United States, which I now have or may have against them or either of them, by reason of injuries received by Mern G. Welker, Brakeman on freight train Extra 2155, running between Stanberry, Missouri, and Council Bluffs, Iowa, such injuries resulting in his death at Shenandoah, Iowa, on or about the 2nd day of April, 1918.

100 It is expressly understood and agreed that said sum of Four Thousand Dollars is the sole consideration for this release, and the consideration stated herein is contractual and not a mere recital, and all agreements and understandings between the parties are embodied and expressed herein.

Received on the 16th day of November, 1918, of W. G. McAdoo, Director General of Railroads, the sum of Four Thousand Dollars, full for the above agreement as recited.

**BESSIE M. WELKER,**

*Administratrix Estate of Mern G. Welker, Deceased.*

The above was read to Bessie G. Welker, Administratrix of Estate of Mern G. Welker, deceased, and signed by her in our presence at Shelbyna, Mo., on the 16th day of November, 1918.

Witnesses:

RICE G. MAUPIN.  
E. H. WELKER.

C. G. WILLIAMSON, a witness, of lawful age, being first duly sworn, and being called as a witness upon the part of the defendants, testified as follows, to-wit:

1 Direct examination.

By Mr. Jones:

Q. You may state your name, please?

By the Witness:

A. C. G. Williamson.

Q. Where do you reside, Mr. Williamson?

A. St. Louis, Missouri.

Q. In whose employ are you?

A. The United States Railroad Administration.

Q. How long have you been employed by the railroad administration?

A. Since December 27th, 1917.

Q. Is that the date when the railroads were taken over by the Federal Government?

A. Yes, sir.

Q. On the 16th of November, 1918, at the time Exhibit Four was executed, in whose employ were you?

A. The United States Railroad Administration.

Q. In making this settlement who did you represent?

By Mr. O'Donnell: We object because the stipulation signed by his gentleman and filed in this court shows on its face.

By the Court: Over-ruled.

2 By the Witness:

A. The United States Railroad Administration.

By Mr. Jones:

Q. I refer you to the stipulation that has been filed in this case on January 6, 1919, signed by the Wabash Railway Company, did you sign that?

A. Yes, sir.

Q. Why was it signed that way?

By Mr. Elliott: We object to him stating why it was signed that way; it speaks for itself.

By the Court: I will let him answer.

By the Witness:

A. The title to the case as shown on our books at St. Louis is as shown here and it was signed accordingly.

By Mr. Jones:

Q. Was it signed to fit the case here?

A. Yes, sir.

Q. I hand you Exhibit Four and ask you if you were present when that was signed?

A. I was.

Q. Who did you represent in the execution of that?

103 A. The United States Railroad Administration.

Q. What promise or agreement, if any, did you make Mr. Welker about paying her attorney?

By Mr. O'Donnell: We object for the reason that this is merely impeaching testimony and hear-say as to the issues here.

By the Court: Over-ruled.

By the Witness:

A. No promise whatever.

By Mr. Jones:

Q. State whether or not Exhibit Four contains all the agreement that was made?

A. That is all.

Q. Something has been said about funeral expenses; did you pay those?

A. I did. The bill was on our files and sent to the United States Railroad Administration by the undertaker, and we objected to that time, but after the settlement was made we settled that funeral bill.

Q. I call your attention to Exhibit Three, being a draft for \$4,000.00, and ask you if you delivered that?

A. I did, sir.

Q. Who were you representing when you delivered that draft?

104 A. The United States Railroad Administration.

Q. State whether or not you had any authority to make payment or offered to make payment or contracted to pay the attorneys?

A. I did not.

By Mr. O'Donnell: We object; that is a conclusion of this witness as to what his authority was.

By the Court: Well, he may answer the question.

By the Witness:

A. I did not have any authority.

By Mr. Jones:

Q. What authority did you have?

A. I was sent there by the railroad administration to take the matter up with her and adjust it for \$4,000.00.

Q. Had a letter been received written by Mrs. Welker, the mother of Mr. Welker—

By Mr. Elliott: We object to that as incompetent, irrelevant and immaterial and because it is not binding in this case.

By the Court: Over-ruled.

105 By the Witness:

A. A letter had been received by the railroad administration at Washington and forwarded to me by our General Solicitor.

By Mr. Jones:

Q. Was that letter delivered to you by any one?

A. It was delivered to me by Mr. Brown, General Counsel for the Railroad Administration at St. Louis.

By the Court:

Q. By the Railroad Administration for the Wabash Railroad?

A. Yes, sir.

Cross-examination.

By Mr. Elliott:

Q. Mr. Williamson, do you know E. M. Cadwell, an abstractor at Shelbyville, Missouri?

By the Witness:

A. I have a very slight acquaintance with him; I just met him once.

Q. What day did you make this arrangement with Mrs. Bessie Welker about settling this Welker case?

A. I think it was the 16th day of November, 1918.

106 Q. Where was that arrangement made?

A. At Shelbyville.

Q. Wasn't Mr. Cadwell present while you and Mrs. Welker were talking about that case?

A. I don't know; he came over some time during the transaction but I don't remember whether he was present or not.

Q. Didn't you then and there at Shelbyville, Missouri, on the 16th day of November, 1918, say to Bessie Welker in the presence of E. M. Cadwell that you would take care of the attorney's fee in her case, or words to that effect?

A. No, sir.

Q. Did you talk to Mrs. Welker more than once in the presence of Mr. Cadwell?

A. I think once was all.

Q. Mr. Williamson, what does the letter "C" after the word "Wabash Railway Company, Defendant, By C. G. Williamson, C." on the stipulation for dismissal mean?

A. I started to write the word "Claim" there and stopped.

Q. Didn't you start to write the words "Claim Agent" there?

A. "Claim Agent" is what I started to write; yes, sir.

Q. Do you know who prepared this stipulation for dismissal in this court on January 6, 1919?

A. It was prepared by Mr. N. S. Brown, General Counsel for the Railroad Administration at St. Louis in his office.

107 Q. Mr. Williamson, were you ever in the employ of the Wabash Railway Company?

A. I was.

Q. In what capacity?

A. Assistant Claim Agent.

Q. Do you work out of the office at St. Louis?

A. I do.

Q. In that office the business of the Wabash Railway Company is only looked after, isn't it?

A. While it was in the railroad business it was.

Q. But at the present time is the business of any other railroad than the Wabash handled through your office?

A. The "Clover Leaf" was but it has stopped now.

Q. Had Mr. Brown been solicitor and counsel for the Wabash railroad also?

A. Yes, sir; and also for the "Clover Leaf," but he only handled the Wabash business now.

Q. And Mr. Brown has for a number of years been solicitor and counsel for the Wabash Railway Company?

A. Mr. Minnis was General Counsel with offices on another railroad and after he went out Mr. Brown was appointed counsel and solicitor.

Q. Didn't you give this stipulation to Mr. Jones, counsel for the Wabash Railway Company, to file here?

A. I think the Company forwarded it to him, or the Railroad Administration through Mr. Brown.

Witness excused.

108 By Mr. Jones: I suppose these railroad orders and proclamations are such a matter of notoriety that the court will take judicial notice of them. However, to make it plain, we offer in evidence all proclamations issued by the President of the United States and all orders made and promulgated by the Director General of Railroads, in so far as they may be applicable in this case.

Which said Proclamations and Orders so offered and introduced in evidence, are in the words and figures following, to-wit:

United States Railroad Administration,  
Office of the Director General,  
Washington.

April 9, 1918.

*General Order No. 18.*

Whereas the Act of Congress approved March 21, 1918, entitled "An Act to Provide for the Operation of Transportation Systems While under Federal Control," provides (Section 10) "That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or with any order of the President, \* \* \* But no process, mesne or final, shall be levied against and property under such Federal control"; and

Whereas it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose; the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice is highly prejudicial to the just interest of the Government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the right or the just interest of plaintiffs.

It is therefore ordered, That all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, (See General Order 18-A) or in the county or district where the cause of action arose.

W. G. MCADOO,  
*Director General of Railroads.*

United States Railroad Administration,  
Office of the Director General,  
Washington.

April 18, 1918.

*General Order No. 18-A.*

General Order No. 18, issued April 9, 1918, is hereby amended to read as follows:

"It is therefore ordered that all suits against carriers while under Federal control must be brought in the county or district where the

plaintiff resided at the time of the accrual of the cause of action in the county or district where the cause of action arose."

W. G. McADOO,

*Director General of Railroads.*

United States Railroad Administration,

Washington,

October 28, 1918

*General Order No. 50.*

Whereas by the Proclamations dated December 26, 1917, and April 11, 1918, the President took possession and assumed control of the systems of transportation and the appurtenances thereof, and appointed the undersigned, William G. McAdoo, Director General of Railroads, and provided in and by said Proclamations that "until and except so far as said Director shall find time to time otherwise by general or special orders determine, the systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes \* \* \* but any orders, general or special, hereafter made by said Director shall have paramount authority and be obeyed as such"; and

Whereas the Act of Congress, called the Federal Control Act, approved March 21, 1918, provided that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers whether arising under State or Federal laws or at common law except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control, or with any order of the President"; and

Whereas since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporations:

112 It is therefore ordered, that actions at law, suits in equity and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage of property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to action, suits, or proceedings for recovery of fines, penalties, and forfeitures.

Subject to the provisions of General Orders numbered 8, 18-A and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.

The undersigned Director General of Railroads is acting herein by authority of the President for and on behalf of the United States of America, therefore no supersedeas bond or other security shall be required of the Director General of Railroads in any court for the taking of or in connection with an appeal, writ of error, supersedeas, or other process in law, equity, or in admiralty, as a condition precedent to the prosecution of any such appeal, writ of error, supersedeas, or other process or otherwise in respect of any such cause of action or proceeding.

W. G. McADOO.

#### *Admission.*

By Mr. Jones: It is admitted by and between the parties hereto that Mern G. Welker received the injuries which resulted in his death at Shenandoah, Iowa; and that he was a citizen and resident of Shelby County, Missouri, at the time of his death, and that at the time this suit was brought the plaintiff, Bessie G. Welker, was also a citizen and resident of Shelby County, Missouri.

By Mr. Jones: "Defendant Rests."

#### *Demurrer.*

By Mr. Jones: Now, at the close of all the evidence in the case, the Wabash Railway Company asks the court to declare the law to be that under the law and the evidence in this case the finding and judgment of the court must be in favor of the defendant, Wabash Railway Company. And we also make a similar request on the part of Walker D. Hines, Director General of Railroads.

By the Court: Which request and motion is denied and the demurrer over-ruled.

To which action and ruling of the court the defendants, and each of them, by counsel, then and there duly excepted at the time and place except.

And thereafter, on the same day, viz., January 7, 1920, during the argument of said cause to the court, by request of the defendant this cause was by the court re-opened for further testimony, and the following proceedings had, to-wit:

C. G. WILLIAMSON, a witness, of lawful age, being first duly sworn and being re-called as a witness upon the part of defendants, testified as follows, to-wit:

115 Direct examination.

By Mr. Jones:

Q. Mr. Williamson, on the occasion of this settlement you state whether or not you said to Mrs. Welker that that \$4,000 was hers and that you had paid the lawyers?

By the Witness:

A. I did not.

Q. Did you say to her that it was hers and to put it in the bank?

A. I did not. I can explain the whole situation. After the whole thing had been signed up she said in the presence of all of us "Is this all my money?" and I said "Judge Maupin has to say what is to be done with that money," and he instructed her to put it in the bank and appointed a guardian for the child; that was at least twenty minutes after the settlement was made.

By the Court:

Q. Did you know at that time that a suit was brought here?

By the Witness:

A. I knew the suit was pending.

Q. Did you know Judge Elliott was representing her in the suit?

116 A. I didn't until she told me.

Q. She told you that he was representing her?

A. Yes, sir. But I had nothing to do with the investigation of the case until afterwards.

Q. You made no investigation after the settlement?

A. Yes, sir; I made some investigation. There was some allegations came up and I verified them or corrected them.

Cross-examination.

By Mr. O'Donnell:

Q. So you did have some conversation with her about Judge Elliott?

By the Witness:

A. That was afterwards.

Q. But you did have while you were there?

A. Yes, sir.

Q. You knew a suit had been brought?

A. She told me a suit had been brought.

Q. How did you ascertain there was any claim against the railroad?

A. I didn't know there was any claim against the railroad.

Q. How did you happen to settle the case?

A. I was instructed by Mr. Brown upon a letter received from Washington by Mr. Brown.

Q17 By the Court:

Q. You stated that you had the case on your docket the same as it was here?

By the Witness:

A. No; that last suit was filed after the settlement.

Q. Didn't you testify that the reason this stipulation of dismissal was entitled as it was, was because you had the case that way on your docket in St. Louis?

A. In the St. Louis office; yes, sir.

By Mr. O'Donnell:

Q. You are in the St. Louis office all the time?

By the Witness:

A. I worked out of the Claim Department.

By the Court:

Q. Is that Mr. Winston's department?

A. Yes, sir.

Q. What is his title?

A. He is General Claim Agent.

Q. Is he attorney and general claim agent?

A. The "attorney" is taken off; he was formerly general claim agent and assistant attorney.

Q. Was that title changed before the settlement?

Yes, sir.

By Mr. O'Donnell:

Q. This settlement was made on the 16th day of November, 1918?

118 By the Witness:

A. Yes, sir.

Q. And the suit was filed on the 5th of June of that year, before that time?

A. I didn't know when the suit was filed.

Q. You have been connected with the claim department of the Wabash Railway Company and the Director General from June until November, 1918?

A. Yes, sir.

Q. And working under this office all that time?

A. Yes, sir.

Q. How long before you settled the case did you make your first trip out there?

A. I couldn't tell you; it was not very long.

Q. How many trips did you make?

A. Two trips before and one trip since this matter has come up.

Q. Where was Mrs. Welker living at the time you made the first trip to see her?

A. Mrs. Welker, I think, was dividing her time between the farm of her father and her mother-in-law's.

Q. Was it in June?

A. No, sir; it was when the weather was cold.

Q. Was it in September?

A. It could't have been in September, because I was in Florida then?

Q. Was it in October?

A. It might have been.

Q. You made a trip out there and talked with the mother-in-law?

A. I talked to the mother-in-law and herself.

119 Q. When was it that you learned Miles Elliott was her attorney?

A. It was about the time I settled with her.

Q. Didn't you know it when you first went out there?

A. They told me that they had a contract and that they sent it to St. Louis, but I never saw it if they did.

Q. They told you the first time you were out there?

A. Yes, sir.

Q. And they told you that they agreed to pay him one-half?

A. They didn't tell me I don't think.

Q. Didn't you receive a copy of the notice served on Mr. Step here in Chillicothe?

A. No, sir; that goes to the Legal Department.

Q. Didn't you investigate the files in the Legal department?

A. No, sir.

Q. Did you go up to Shenandoah, Iowa, to make an investigation?

A. I did.

Q. What month was that?

A. I think it was after the suit was filed.

Q. What time?

A. I divided myself between the Army and the United States Railroad Administration, and I couldn't tell you when that was.

Q. That was how soon after Mr. Welker was killed?

A. I don't know how soon it was afterwards; they told me there was some facts they wanted to corroborate after his death, whether he died immediately or not, and that is what I went up there for.

Q. You knew under the Employers' Liability Act if he lived for some time afterwards that the recovery could be greater and you were familiar with that?

A. Yes, sir.

Q. And you were familiar with the details up to that time?

A. To that extent.

Q. You knew about the suit being filed?

A. I did when they told me about it.

Q. But you did talk to them the first time you saw them about the suit being filed?

A. The first time they told *be* about the agreement.

Q. You made an agreement with this woman to pay \$4,600?

A. Yes, sir; in settlement.

Q. What did she say about Mr. Elliott being compensated?

A. Nothing whatever was said about it.

Q. Did she ask you if she could use all of this money for herself?

A. She asked in the presence of Judge Maupin if she could use that money and Judge Maupin said for her to deposit the check in the bank and he would instruct her how it should be distributed. She had one child and a guardian was appointed.

Q. Do you know what part of the money was allotted to the child?

A. I have not heard a word only what the Judge said to do.

121 By the Court:

Q. Was that stipulation for the dismissal of the case signed at the same time the agreement of settlement was signed?

A. All the papers were there at that time and everything was signed at the same time.

Q. And the check was delivered to her at that time?

A. Yes, sir; the check was delivered to her in the presence of all of them.

Witness excused.

By Mr. O'Donnell: Now, we want to re-call Judge Maupin.

RICE G. MAUPIN, a witness of lawful age, first having been duly sworn as a witness upon the part of defendants, and being re-called by Movent for further examination, testified as follows, to-wit:

Examination.

By Mr. O'Donnell:

Q. Were you present when Mrs. Welker and Mr. Williamson were present in the Probate Court or in Shelby County in the month of November, 1918, at the time this paper was shown to her? (indicating).

122 By the Witness:

A. I wouldn't know they signed it unless I was present.

Q. What did you do at that time with the proceeds of this settlement; what did you order Mrs. Welker to do with it?

A. I didn't order her to do anything with it; she put it in the bank.

Q. Did you appoint a guardian for the child?

A. I did.

Q. How much money was deposited to his credit?

A. It was all deposited to her credit as administratrix.

Q. How much went to the child?

A. Nothing until the order of distribution was made.

Q. How much did he get under that order?

A. \$1,800.00; the court ordered partial distribution and distributed \$3,600.00.

Q. Who was to get the proceeds?

A. Bessie Welker was to receive \$1,800.00, and E. M. Cadwell, Curator for the child \$1,800.00.

Q. What was done with the remaining \$400.00?

A. Part of it went to pay debts, but final settlement has not been made.

Q. It was your understanding that the \$4,000.00 was to be used by the administratrix and her boy?

By Mr. Jones: We object to what his understanding was, let him state what occurred and what was said.

123 By the Court: This is cross-examination, but still the conclusions of the witness ought not to be given.

By Mr. O'Donnell:

Q. State what happened there and what was said?

By the Witness:

A. There was nothing said only that she received the check for \$4,000.00 as administratrix and when the court made the order of partial distribution,—perhaps before the year,—and she was wholly incompetent to act as administratrix,—she received \$1,800.00 and Mr. Cadwell as Curator for the child received \$1,800.00 and the remainder is there subject to the orders of the court, excepting what has been paid out for debts.

By the Court:

Q. Was there anything said there that she was to pay any part of this to her attorney?

By the Witness:

A. No, sir.

Q. Was there anything said about the payment to the attorney at that time?

A. No, sir; it was not mentioned at all.

By Mr. O'Donnell: "We rest again."

By Mr. Jones: "So do we."

121 Thereupon, this cause was continued under advisement by the court until the following day.

And thereafter, and on, to-wit, January 8, 1920, the same being the fourth day of the regular January Term, 1920, of said court, the parties hereto being present in open court, as aforesaid, at the request of the Movant herein this cause is re-opened for further evidence, and the following proceedings had, to-wit:

E. H. WELKER, a witness, of lawful age, being first duly sworn, and being called as a witness upon the part of the Movant and Petitioner, testified as follows, to-wit:

Direct examination.

By Mr. O'Donnell:

Q. How old are you?

By the Witness:

A. Fifty-five.

Q. What is your business?

A. I am in the grocery business at Hannibal, Missouri.

Q. Where was your home before you moved to Hannibal?

A. Shelbyna, Missouri; my home is still there, and I used to be in the grocery business there.

125 Q. Do you have any children?

A. Yes, sir; four boys and one girl.

Q. Are they all living?

A. No, sir.

Q. How many are dead?

A. One.

Q. What was his name?

A. Merne Welker.

Q. What was his age at the time of his death?

A. About twenty-two, I believe; I won't be positive.

Q. He had been recently married?

A. Yes, sir.

Q. What was his wife's name?

A. Bessie.

Q. Do you know about his wife bringing a suit against the Wabash Railway Company to recover damages for his death?

A. Yes, sir.

Q. And she was appointed administratrix for the estate?

A. Yes, sir.

Q. Did you know about that suit having been settled?

A. Well, I did in a way; I happened to come home for lunch when this agent, Mr. Williamson, was there.

Q. This is the gentleman here behind Mr. Jones? (Indicating).

A. Yes, sir; and I was in a hurry and he asked her to sign paper to show that this payment had been made and we had a few words and I had to go back to the store.

126 Q. You came up here from Hannibal at the request of the Wabash Railway?

A. Yes, sir.

Q. And you came to Shelbina last night?

A. Yes, sir.

Q. And when you came here to Chillicothe Mr. Williamson took you to dinner?

A. Yes, sir.

Q. And I had not had a chance to talk to you?

A. No, sir.

Q. Do you recall seeing Mr. Williamson give that draft, Exhibit Three, to your daughter-in-law?

A. No, sir; I didn't see him.

Q. Were you present at any time when there was a conversation between Mr. Williamson and Bessie?

A. No, sir.

Q. Were you present when that document, Exhibit Four, was signed?

A. Yes, sir; the paper I signed; yes, sir.

Q. You saw this paper, Exhibit Four?

A. Yes, sir.

Q. While you were there in connection with the signing of the release, Exhibit Four, what was it Mr. Williamson said to Bessie?

A. He said that the reason this money had been held back was that he was aware of this accident in a very short time after my boy was killed and that they had started in to make arrangements to make a settlement and that about the time they got this very near ready he saw where Bessie Welker had filed suit, and he said "We stopped."

Q. What else did he say, if anything, about the payment of the lawyer's fees?

127 A. Not a word that I remember.

Q. What did he say about the Government having taken over the railroads?

A. He said that the Wabash Railroad was out of the hands

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Wabash Company and was in the hands of the Government and that those people couldn't collect from the Government.

Q. What people?

A. Those lawyers that solicited this suit.

Q. Mr. Elliott?

A. I believe it was Mr. Elliott. They were all strangers to me, because I was away from home.

Q. What did he say about whose money that was?

A. He never mentioned that to me; our conversation was very short.

Q. About how long did he say it would be before Bessie Welles's attorney would get his money?

A. He never mentioned that to me.

Q. To refresh your memory, didn't he state within your hearing at the lawyers would not get their money for years, or words to that effect; didn't Mr. Williamson say, in substance, that the lawyers could not collect their money in a thousand years?

A. He said that they couldn't collect it, and I had it a thousand years myself, because I believed it.

Q. He said that they couldn't collect it from the Government?

A. Yes, sir.

Q. What did Bessie say to him about paying her lawyers?

A. I couldn't tell you.

Q. Did he say anything to her that he would pay her lawyers?

A. No, sir; not that I know of.

Q. How long were you present there?

A. I judge I was present about fifteen minutes at dinner.

Q. When you came there who was present?

A. Mr. Williamson and Bessie and my wife.

Q. Did you see Bessie sign this document, Exhibit Four?

A. No, sir.

Q. Did you see Judge Maupin sign it?

A. Yes, sir.

Q. You signed it, however?

A. Yes, sir.

Q. And in the discussion you recall that he said that the lawyers couldn't collect from the Government?

By Mr. Jones: I object as repetition and killing time.

By Mr. O'Donnell: I believe that is correct.

By Mr. O'Donnell:

Q. This paper that you signed (Exhibit 4) state whether or not it was prepared there or had it already been prepared?

By the Witness:

A. I don't know; it was laying on the writing desk when I saw it.

Q. Had it been signed by Bessie at that time?

A. I didn't notice.

Q. Do you remember all that was said there?

A. I was not there but a very short time. The only conversation between me and Mr. Williamson is just what I have told you.

Witness excused.

E. M. CADWELL, a witness, of lawful age, being first duly sworn, and being called as a witness upon the part of the movant, testified as follows, to-wit:

Direct Examination.

By Mr. O'Donnell:

Q. What is your name?

By the Witness:

A. E. M. Cadwell.

Q. What is your business?

A. Abstractor.

Q. Where do you live?

A. Shelbyville, Missouri.

Q. Are you acquainted with Bessie Welker?

A. Yes, sir.

Q. Did you know her husband?

A. No, sir.

Q. Do you know her father and mother?

A. Yes, sir.

130 Q. You know her child, don't you?

A. Yes, sir.

Q. You are Curator for the estate?

A. Yes, sir.

Q. Did you know her first husband, Mern Welker?

A. Yes, sir.

Q. You were a brother-in-law to Mern Welker?

A. Yes, sir.

Q. And you are a son-in-law of the gentleman who has testified?

A. Yes, sir.

Q. Is that your signature, (Exhibiting letter to witness) you refresh your recollection by reading that letter?

A. Yes, sir; that is my letter.

Q. This is a letter written by you to Bessie Welker?

A. Yes, sir; in reply to one written by her.

Q. On the 25th of October, 1919?

A. Yes, sir.

Q. Did you have any conversation with Mr. Williamson?

A. Yes, sir; I had a conversation with Mr. Williamson on occasion last year some time.

Q. Was that before the settlement was completed and the money paid in the Welker case?

A. Yes, sir.

Q. Tell the court what that was?

By Mr. Jones: That is objected to for the reason that any conversation between Mr. Williamson and this witness would  
131 be purely hear-say and not binding on the defendants.

By Mr. O'Donnell:

Q. That may be right in that way. I will put it in this way: State whether or not Mr. Williamson in substance made this statement to you: "That the Wabash would attend to the attorneys in this case" or words to that effect: (Examining letter shown witness) not that they would pay the attorney's fees but he did say Mrs. Welker would never have to pay them and intimated if anybody would have to pay them it would be the railroad company?

By Mr. Jones: That is objected to for the reason it is not shown that Mr. Williamson had any authority to make an agreement to pay attorney's fees.

By Mr. O'Donnell: I believe it is objectionable in that form.

By Mr. O'Donnell:

Q. State whether or not Mr. Williamson did not say to Bessie in your hearing or to you that the railroad would attend to the attorney's fees in the case?

By the Witness:

A. No, sir; he did not.

Q. What was it he said?

By Mr. Jones: The defendants and each of them object to the question for the reason that it calls for hear-say evidence  
132 and for the reason that it was in the absence of Mrs. Welker, and for the further reason that he had no authority to pay attorney's fees at the time the settlement was made, and it is incompetent and not binding on the defendants; and because it is not shown that Mr. Williamson had any authority to make any compromise that would be binding on the defendants as to attorney's fees.

By the Court: Sustained.

By Mr. O'Donnell:

Q. What was it Mr. Williamson said to Bessie Welker in regard to this in your presence?

By the Witness:

A. I never had a conversation with Mr. Williamson in her presence in regard to this matter. I made a remark in front of the Waverly Hotel in Shelbyville to Mr. Williamson and we walked about three blocks and talked about this matter; that was the first trip I made there; that was not the time he paid the money.

Q. State whether or not Mr. Williamson was endeavoring to settle the case at that time?

A. Yes, sir.

Q. State whether or not you participated in any of the deliberations?

A. I was called over there for that purpose by Mrs. Welker.

Q. Which Mrs. Welker?

A. Mrs. Bessie Welker.

133 Q. Were you acting as her advisor in the matter?

A. I suppose that is what you would call it; she wanted to talk to me about it.

Q. You did see Mr. Williamson there?

A. I saw him at the hotel and on the street.

Q. Had she sent for you to talk about the matter?

A. She called me from Shelbyville to talk about the matter.

Q. And you consulted him at her direction?

A. We talked about it; yes, sir.

Q. What was your purpose in talking to him?

A. The object I had was in finding out how much money he would pay.

Q. Did you find out?

A. He made a proposition.

Q. What was it?

A. \$4,000.00.

Q. What was that \$4,000.00 for?

A. It was in settlement of this claim.

Q. To whom was it to be paid?

A. To be paid to Mern G. Welker's estate.

Q. State whether or not under the agreement you had with Mr. Williamson that money was to go to the estate, all of it?

A. Yes, sir.

By Mr. Jones: That is objected to for the reason that it throws light on this case and would not be binding on either of the defendants.

134 By Mr. O'Donnell:

Q. Well, state whether or not Mr. Williamson did not then say there that all of that \$4,000.00 was to belong to the estate and that Mrs. Welker would not have to pay any attorney's fees?

By the Witness:

A. No, sir; he did not.

Q. Well, what did he say?

By Mr. Jones: We object for the same reasons.

By the Court: Over-ruled.

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

By the Witness:

A. As I remember it, he said he had authority to offer \$4,000.00 in settlement of this claim, and of course, I was trying to get a little more money; and he said it was possible that they would pay the funeral or burial expenses, but he didn't make any offer to that effect.

By Mr. O'Donnell:

Q. You did write to Mrs. Welker in regard to this matter?

A. Yes, sir; in reply to some letters she wrote me.

35 Q. State when it was in the course of your conversations with Mr. Williamson that he intimated that the railroad company would pay the attorney's fees?

By Mr. Jones: That is objected to for the same reasons; it would not prove anything.

By the Court: I will hear it subject to the objection.

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

By the Witness:

A. Well, really I would have to explain a little bit to make myself clear about that; I never paid a great deal of attention to what Mr. Williamson said about the lawyer's fees; I had had a little legal advice before I went over there; I had advice through an attorney that he would not have to pay them and I didn't pay very much attention to that.

By Mr. O'Donnell:

Q. Did you get advice from an attorney after you found what terms he would settle the case on?

A. No, sir; I had the advice before I left Shelbyville.

By Mr. Jones: I object to him interrogating the witness in that way.

6 By Mr. O'Donnell:

Q. Then when was it and where was it that he intimated that the railroad company would pay the attorney's fees?

A. Well, I couldn't just say about that, when it was or where it was; that letter you have there was written by me in answer to a letter she wrote me. (Indicating).

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By Mr. Jones: We move to exclude all preceding questions and answers relating to this letter and the intimation of Mr. Williamson about attorney's fees.

By the Court: Over-ruled.

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

By Mr. O'Donnell:

Q. When was it and where was it that he intimated that the railroad would pay the attorney's fees?

By the Witness:

A. I couldn't answer that.

Q. Isn't it a fact that some time during those negotiations that he did intimate that the railroad company would take care of the attorney's fees?

137 By Mr. Jones: We object for the reason that Mrs. Welker was not present and it would not be binding on either of the defendants.

By the Witness:

A. I never had a conversation with Mr. Williamson in Mr. Welker's presence.

(Here at the request of counsel, the last question above was put to the witness by the Reporter.)

By Mr. Jones: To which we object.

By the Court: Over-ruled.

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

By the Witness:

A. Well, I couldn't answer that question. Of course, as a matter of fact in the face of the advice I had had I knew she would have to pay the attorney's fees and that is all I was interested in.

By Mr. O'Donnell:

Q. So it was your understanding that she was to have that money net to herself?

A. Yes, sir; that was my understanding.

Q. And you know she has kept it all for herself and the estate?

A. Yes, sir.

138 Q. And that she intends to keep it?

A. Yes, I expect she intends to keep it.

Q. To refresh your recollection by a direct question, I will ask you if Mr. Williamson didn't at some time during those negotiations that Mrs. Welker would not have to pay any attorney's fees?

A. No sir; not in my presence.

Q. Didn't he tell you some time during those negotiations that the railroad company would attend to the attorney's fees? (Examining letter written by witness.)

A. No, sir.

Q. Did he tell you that the Director General would?

A. No, sir.

Q. Did he tell you that anybody would?

A. No, sir; he never told me that anybody would.

Q. You had dinner with Mr. Williamson here today?

A. Yes, sir; I had dinner at the same table he did.

Q. You were subpoenaed last night and came here and ate dinner with Mr. Williamson today?

A. Yes, sir; but I was subpoenaed by the defense.

Q. And when you came here Mr. Williamson took charge of you?

A. Well, he was at the train and several of us came up together.

139 Cross-examination.

By Mr. Jones:

Q. And Mr. Creason came up with you on the train?

By the Witness:

A. Yes, sir; he has been with me pretty close.

Q. Did you see him last night?

A. Yes, sir; about one o'clock.

Q. Where was it that you saw him last night?

A. He was at my house.

Q. At Shelbyville, Missouri?

A. Yes, sir.

Q. About one o'clock?

A. Yes, sir.

Q. Did you see him on the train coming here?

A. Yes, sir.

Q. Mr. Creason is connected with Mr. Elliott in this case?

A. I couldn't say; he subpoenaed me.

Q. He is the gentleman sitting here behind Mr. O'Donnell at the counsel table? (Indicating.)

A. Yes, sir.

Witness excused.

By Mr. O'Donnell: "We rest."

140 By the Court: Call your additional evidence, Mr. Jones.

Thereupon, the defendants, to further maintain the issues upon their parts, offered and introduced the following additional evidence, in rebuttal, to wit:

Mrs. E. H. WELKER, a witness, of lawful age, being first sworn, and being called as a witness upon the part of defendants, rebuttal, testified as follows, to wit:

Direct examination.

By Mr. Jones:

Q. You live at Shelbina, Missouri?

By the Witness:

A. Yes, sir.

Q. You are the mother of Mern Welker?

A. Yes, sir.

Q. You remember of his death?

A. Sure.

Q. You remember the suit being brought against the railroad company on account of his death?

A. Sure.

Q. And the suit was afterwards settled, wasn't it, or compromise?

A. Yes, sir.

141 Q. Who came there to compromise the case?

A. Mr. Williamson.

Q. This gentleman here? (Indicating Mr. Williamson.)

A. Yes, sir.

— Who did he talk to on that occasion?

A. Well, I don't know that I know what you mean.

Q. Was your daughter-in-law present?

A. Yes, sir; after I phoned for her, and she came six miles.

Q. Before that time you had written a letter to Mr. McAdams, Director General of Railroads, about this case?

A. Yes, sir; I asked him to do something for the girl and the baby.

Q. And was it after this that Mr. Williamson came there?

A. Yes, sir.

Q. You heard the conversation between he and Mrs. Welker?

A. Yes, I heard it.

Q. I want you to tell the court whether or not in that conversation—

By Mr. Elliott: We object; let her state the conversation.

By the Witness:

A. I couldn't go through with that conversation and I won't because I can't tell it.

142 By Mr. Jones:

Q. I just want to ask you one question. State whether or not that conversation there Mr. Williamson promised to pay Mrs. Welker's attorney's fees.

A. He did not.

Cross-examination.

By Mr. Elliott:

Q. Mrs. Welker, didn't Mr. Williamson say that all of this \$4,000.00 should belong to Bessie Welker and the child and that they would not have to pay any of it to the lawyer?

By the Witness:

A. I just told you I couldn't repeat that conversation.

Q. Didn't Mr. Williamson say that all of the \$4,000.00 that he was going to pay her should belong to Bessie and the child and she would not have to pay her lawyers anything?

A. Didn't you and Mr. Creason ask me that question three times in my home?

Q. Didn't Mr. Williamson say that?

A. No, he didn't.

Q. Didn't he say that she would not have to pay the lawyers anything?

A. No, sir; he didn't say that, but I can't tell you all the conversation.

Q. Didn't he say that he would see that the lawyers didn't get anything off of her?

A. I don't think he said that; he said that money was Bessie's.

143 Q. He said it was Bessie's money?

A. He handed the check over to her and said it was Bessie's.

Q. Didn't Mr. Williamson talk to you more than once about it?

A. I think twice.

Q. Was Bessie there both times?

A. I think she was.

Q. In one of those conversations didn't Mr. Williamson say that he would attend to the attorneys or something to that effect; you remember his saying something to that effect, don't you, Mrs. Welker?

A. I think he told me I could write to McAdoo again or something like that and tried to joke me.

Q. That is, he said if the lawyers bothered you that you could write to McAdoo and he would take care of them?

A. He didn't say that that I know of.

Q. Do you remember his saying something to that effect; do you remember his saying something to that same effect or something of that sense?

A. He didn't say he would pay the lawyers.

Q. I didn't ask you that. Didn't he say if the lawyers bothered her she should write to McAdoo and that he would take care of the lawyers?

A. Bess didn't write to McAdoo.

Q. Didn't Mr. Williamson say if the lawyers bothered Bessie that she could write to McAdoo?

A. I don't think he did.

Q. Didn't you tell me in your house that Mr. Williamson said he would attend to the attorney's fees?

141 A. I told you that I didn't remember the words that were used; I said he told me to write to McAdoo.

Q. Didn't you tell me that he said he would take care of the lawyers?

A. Do you want me to answer that fourteen times? I have answered all I know.

Q. Didn't you tell me that?

A. No.

Q. Didn't you say to me that Mr. Williamson said he would attend to the lawyers or something of that kind?

A. No.

Q. Didn't you tell me that you understood from Mr. Williamson that Bessie would not have to pay anything to me?

A. No, I don't think he said anything about you, only when I asked him if there could be any trouble over it he said I could write to McAdoo again if we got into trouble.

Q. Don't you remember telling me that I could collect my share off of the Government because Mr. Williamson said I could?

A. No, sir; I don't remember any such thing.

Q. Don't you remember telling me that if I would promise to make you come to court to testify to that, but would come over there and take your deposition at Shelbyville, that you would testify that—

A. I told you I would tell the truth.

Q. Didn't you tell me if I would promise not to make you come to court but would come over to Shelbyville and take your deposition that you would testify that Mr. Williamson said he would attend to the lawyers or take care of the lawyer's fees?

145 A. No, I don't remember—

Q. Don't you remember telling me that?

A. No, I don't remember telling you that. I told you I was coming over here and you said you were going to get your money off of the railroad company and I told you I had no evidence for you.

Q. Didn't you tell me that Mr. Williamson said the railroad company would pay it?

A. No, sir; I think that has been asked me a dozen times.

Q. Just repeat all the conversation you can remember between Mr. Williamson and you and Bessie there?

A. I can't tell it all.

Q. Tell all that you can recollect of it?

A. When they came in the best I remember I telephoned for Mr. Cadwell and I sent for Judge Maupin when the settlement was made and I took the baby and took care of it; I didn't stay in there and hear all of it.

Q. There was a great deal of the time when nobody was there with Mr. Williamson and Bessie, when no one was there with them?

A. No one that I remember of.

Q. Was Bessie there when Mr. Williamson came to your house?

A. I don't think she was.

Q. When she came you took the baby?

A. I watched after the baby and turned the business over to the men.

Q. You didn't pay much attention to it?

A. I couldn't tell you what the conversation was.

146 Q. Did you hear all the conversation that day between Mr. Williamson and Bessie or not?

A. If I did, I couldn't repeat it, no.

Q. Were you in the same room with them all the time?

A. Part of the time, and I was in and out all the time.

Q. You didn't hear all the conversation between Mr. Williamson and Bessie?

A. Not that I remember of.

Q. How many times was Williamson at your house, twice?

A. I think so.

Q. Was he there any more than that?

A. If he was I don't remember it.

Q. Judge Maupin didn't hear any of the conversation between Mr. Williamson and Bessie?

A. I don't know.

Q. They had their conversation before Judge Maupin came to the House?

A. I don't know about that; you have got me confused.

Q. Judge Maupin was not there but a few minutes?

A. I don't think he was there very long.

Q. How long was Mr. Williamson there do you think?

A. I never looked at the clock; I don't know.

Q. An hour or two?

A. I don't know; I couldn't swear to it.

Q. Do you think he was there at your house as much as a half hour?

A. I judge it was, but I don't know it; I will not swear to any time because I didn't watch the clock.

147 Q. Was he there for dinner or anything of that kind?

A. No, sir.

Q. Was he there during the meal hour?

A. I think he was once.

Q. About what time did Mr. Williamson come there the day you called Bessie over; about what time of day do you think that was?

A. I don't know; it was in the fore-noon I think.

Q. Do you think it was about nine or ten o'clock?

A. I don't know; I think it was along about that time.

Q. And he stayed there until noon, you think?

A. No, he went up town and I think Mr. Cadwell met him up town.

Q. Did they come back there together?

A. I don't know.

Q. At the time that paper was signed there which your husband and Judge Maupin signed as witnesses, do you remember that time?

A. I don't remember the signing of the paper.

Q. Judge Maupin was just there once when Mr. Williamson was there; is that right?

A. I don't know; I think the Judge was there once concerning that.

Q. What time do you think Mr. Williamson came that day, along about nine or ten o'clock in the morning?

A. I don't know.

Q. Do you know about how long he was there?

A. I don't know.

Q. Was he there as much as an hour?

A. That is the same question over again.

148 Q. Would you say he was there a half hour?

A. No; I am not going to say what I don't know.

Q. Didn't he tell you if you would write a letter to the Government or to Mr. McAdoo that they would pay the attorney fees?

By Mr. Jones: That has been asked and answered.

By the Witness:

A. I am perfectly sure he didn't say that, but I have answered it about three times, I think.

By Mr. Elliott:

Q. Didn't he tell you to write to the Director General or to Mr. McAdoo if there was any trouble from the lawyers about attorney fees?

A. Yes, I have told you that about six times.

Q. What did you say about that?

A. He said "You can write to McAdoo."

Q. He said if you had any bother about the lawyer's fees to write to Mr. McAdoo, is that right?

A. Haven't I answered that enough?

By the Court:

Q. I would like to understand just what he said about that; I don't understand yet in just what connection he said that. You say he said something about writing to Mr. McAdoo, but I don't understand in just what connection he said that?

149 By the Witness:

A. I don't myself, only for me to write to McAdoo. I don't think the lawyers were doing anything and then I wrote to McAdoo and asked him if he could do anything. I supposed the Government had control of all the railroads and I had a letter from Mr. McAdoo and I thought Mr. Williamson was throwing a joke at me about that when he said that.

By the Court:

Q. In what connection did he say that about writing to McAdoo?

A. I can't tell you now, Judge, just where that come in at.

By Mr. Elliott:

Q. Didn't you say to him something about what to do if the lawyers bothered you or tried to make Bessie pay them any of that money, and didn't he say to writ to McAdoo?

By the Witness:

A. I think you said you could sue Bessie for one-half of what she got.

Q. Yes, I said I could sue her for one-half of what she got; but didn't Mr. Williamson say if the lawyers bothered you that you could write to McAdoo?

A. I have answered that as far as I know. And as far as the connection is concerned I can't place it.

150 (Here the question above is read to the witness.)

A. I don't know that he said "bothered." He said to write to McAdoo, and I can't bring in the connection of that conversation.

Q. If the word "bothered" was left out of the question wasn't that the same sense of it, if the lawyers tried to make Bessie pay the fees or make you people pay them to write to Mr. Adoo; not those exact words, but words to that effect?

A. I have said all I know.

Q. You don't know then, do you?

A. And I don't think you do either.

Q. Didn't you tell me that Mr. Williamson said to you and Bessie that Mr. McAdoo would pay me \$500.00, and didn't you say you thought that would be enough for me?

A. I didn't tell you that Williamson said they would pay you anything. Is that plain enough?

Q. Yes?

A. All right; don't ask it any more then.

Q. Didn't you tell me if I would take your deposition at Shelbyna and not make you come here to court that you would testify that Mr. Williamson said Mr. McAdoo would pay me \$500.00?

A. I have just answered that three times.

By the Court:

Q. Answer it again?

By the Witness:

A. I didn't tell him that.

By Mr. Elliott:

Q. You say you got a letter from Mr. McAdoo?

A. I did.

151 Q. Have you got that letter?

A. No, sir.

Q. Where is that letter, do you know?

A. You know as much about it as I do; I never kept it and I don't know where it is.

Q. Didn't Mr. Williamson tell you this: didn't he say that the Government would not let the lawyers get any money off of Bessie?

A. Well, if that is in that conversation, I don't remember about that at all. I don't remember using them words.

Q. Did he say something to that effect?

(Witness hesitates.)

By the Court: Answer the question.

By the Witness:

A. I don't know how to answer it; I have answered it a half dozen times it seems to me.

By the Court:

Q. He asked if he said something to that effect?

By the Witness:

A. He told me to write to McAdoo, and I didn't understand what he meant unless it was just a joke because I wrote to McAdoo.

Witness excused.

By Mr. Jones: "Defendants rest. We have nothing further."

152 By Mr. O'Donnell: In view of some of the testimony will now want to call Mr. Elliott.

MILES ELLIOTT, the movent, of lawful age, being first duly sworn and being called as a witness in his own behalf, in rebuttal, testifies as follows, to-wit:

Direct examination.

By Mr. O'Donnell:

Q. What is your name?

By the Witness:

A. Miles Elliott.

Q. You are the petitioner in this case?

A. Yes, sir.

Q. And you are a practicing lawyer at Chillicothe?

A. Yes, sir.

Q. You may state if you ever met the lady who has just left the witness stand?

A. Yes, sir.

Q. Where?

A. At her home in Shelbina, Missouri. And I would like to add after having heard of this settlement some time after the settlement had been made, I went to Shelbina to learn, if possible, the facts connected with the settlement and I went to the home of this  
153 witness, Mrs. Martha Welker, and talked with her for probably one hour.

Q. Judge Elliott, did you have a talk with this lady, Mrs. Welker, about what Mr. Williamson had said to her concerning the payment of your attorney's fee?

A. Yes, sir; I went there to have such a conversation with her and to ask her what, if anything, Mr. Williamson said about the payment of my fee or of the attorney's fees in the case.

Q. You are familiar with the rule; you may confine your answer to that in giving the court your recollection of what she said?

A. On that occasion Mrs. Welker told me very positively that Mr. Williamson said he would attend to the attorney's fees——

By Mr. Jones: That is objected to unless it is for the sole purpose of contradicting her.

By Mr. O'Donnell: That is what it is for. Go ahead.

By the Witness:

A. I would like to add that Mrs. Welker also told me on that occasion that Mr. Williamson had told her that Mr. McAdoo would pay me a fee of \$500.00 in the case and that she thought that was all or more than I had earned.

Q. Is that all she said?

A. No. Then I asked her, Mrs. Welker, to try to learn if she would be willing to go to court and testify to those facts; and  
154 she said "You cannot make me come to court," and she also said on that occasion "If you will come here to Shelbina and take my deposition, I will testify that Mr. Williamson told Bessie and me that he would attend to the attorney's fees, and that Mr. Williamson said McAdoo would pay you a fee of \$500."

Cross-examination.

By Mr. Jones:

Q. Merely for information,—you brought suit in the Circuit Court of Chariton County at Salisbury?

A. Yes, sir.

Q. Have you dismissed that suit?

A. Yes, sir; that was brought before the filing of this suit and was dismissed before this motion was filed.

Q. That suit was brought against the Wabash Railroad Company.

A. I think that is correct; I feel sure that is correct.

Witness excused.

By Mr. O'Donnell: "We rest."

155 By Mr. Jones: Defendants move the court to exclude the contract offered in evidence between Mr. Elliott and Bessie M. Welker, Administratrix of the Estate of Mern G. Welker, for the reason that said contract limited the authority of Mr. Elliott to bring a suit against the Wabash Railway Company alone.

By the Court: "Which motion to exclude is denied."

To which action and ruling of the court the defendants, by counsel, then and there duly excepted at the time and still except.

*Demurrer.*

By Mr. Jones: Now, we want to renew our other motions. Comes now the defendant, Wabash Railway Company, at the close of all the evidence in the case and moves the court to declare the law to be that under the pleadings and the evidence in the case that the finding and judgment must be for the defendant, Wabash Railway Company.

By the Court: Demurrer over-ruled.

To which action and ruling of the court the defendant, Wabash Railway Company, by counsel, then and there duly excepted at the time and still excepts.

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*Demurrer.*

We want the same motion on the part of the Director General. Comes now the Director General of Railroads at the close of all the evidence in the case and moves the court to declare that under the pleadings, the law and the evidence in the case that the finding and judgment must be for the defendant, Walker D. Hines, Director General of Railroads.

By the Court: Demurrer over-ruled.

To which action and ruling of the court the defendant, Walker D. Hines, Director General of Railroads, by counsel, then and there duly excepted at the time and still excepts.

Thereupon, at the close of all of the evidence in the case the movant moves the court to declare the law as follows:

No. 1.

The court declares the law to be that the Circuit Court of Livingston County, Missouri, under the evidence in this case has jurisdiction over both defendants in this proceeding.

## No. 2.

The court declares the law to be that under the evidence in this case the finding and judgment against either defendant, if against either or both, or if against both, must equal the amount actually paid in compromise or settlement of the suit or claim of Bessie Welker, Administratrix, against the Wabash Railway Company.

## No. 3.

The court declares the law to be that under the facts in this case, C. G. Williamson was the agent of and did represent the Wabash Railway Company and the Director General of Railroads in making a settlement and compromise of the case of Bessie G. Welker, Administratrix, against the Wabash Railway Company.

## No. 4.

The court declares the law to be that the claim agent, C. G. Williamson, acting for and on behalf of the Wabash Railway Company and the Director General of Railroads, knew that plaintiff was represented by Movant and that said Wabash Railway Company and the said Director General of Railroads had notice that plaintiff had made a contract with Movant by which she agreed to pay Movant for his services as attorney in the case pending for the death of her husband.

## No. 5.

The court declares the law to be that C. G. Williamson, the claim agent, made an agreement with the plaintiff while acting for and on behalf of the Wabash Railway Company and the Director General of Railroads, by the terms of which it was contemplated that the entire sum paid to plaintiff should be hers absolutely and that she would have to pay no part thereof to Movant, her attorney.

## No. 6.

The court declares the law to be that under the evidence in this case C. G. Williamson, the claim agent, did make an agreement with plaintiff to pay the fees of her attorney.

## No. 7.

The court declares the law to be that Movant herein, under the facts, is entitled to recover against the Wabash Railway Company.

## No. 8.

The court declares the law to be that under the evidence in this case Movant is entitled to recover against the Director General of Railroads.

159 The court gave instruction or declarations of law numbered 2, 3, 4, 5 and 7. The court refused to give instructions numbered 1, 6 and 8 as requested by Movent. To the action of the court in refusing to give said instructions and each of them Movent at the time duly excepted and still excepts. And to the action of the court in giving said instructions numbered 2, 3, 4, 5 and 7, defendants duly excepted and saved their exception and still except.

Thereupon at the close of all of the evidence in the case, the defendants, jointly and severally moved the Court to declare the law as follows:

#### No. 1.

The Court declares the law to be that the Circuit Court of Livingston County, Missouri, under the facts of this case has no jurisdiction over the defendant, the Director General of Railroads of the United States.

#### No. 2.

The Court declares the law to be that the Circuit Court of Livingston County, Missouri, under the facts of this case has no jurisdiction over the defendant, The Wabash Railway Company.

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#### No. 3.

The Court declares the law to be that under the evidence in the cause, the finding and judgment against either defendant, if against either or both, cannot exceed One-Half of the amount actually paid in compromise and settlement of the suit or claim of Bessie Welker, Administratrix, against the Wabash Railway Company.

#### No. 4.

The Court declares the law to be that when the Wabash Railway was taken over by the Federal Government under the proclamation of the President of the United States, the agent of said railroad, Chillicothe ceased to be the agent of said Wabash Railway Company but became the agent of the Director General of Railroads and the service of process or notices on said agent after December 28th, 1917, was not and did not constitute service on the Wabash Railway Company.

#### No. 5.

The Court declares the law to be that this suit being originally brought against the Wabash Railway Company as sole defendant and process issued against and served and returned as against the Wabash Railway Company as sole defendant, all of which subsequent to December 28th, 1917, did not confer jurisdiction

161 on this Court over said Wabash Railway Company nor of the cause of action alleged in plaintiff's petition or movement for claim for attorney's fees as against the Wabash Railway Company

## No. 6.

The Court declares the law to be that the notice offered in evidence of movent's contract with plaintiff for attorney's fees and purporting to be served on W. R. Stepp did not constitute any notice to the Wabash Railway Company of such contract between movent and plaintiff.

## No. 7.

The Court declares the law to be that under the facts in this case C. G. Williamson was not the agent of and did not represent the Wabash Railway Company in making a settlement and compromise of the case of Bessie M. Welker, Administratrix, vs. The Wabash Railway Company.

## No. 8.

The Court declares the law to be that before C. G. Williamson could make an agreement to pay plaintiff's attorneys their fees, which would be binding on defendants or either of them, he must have been clothed with authority so to do and the burden is on movent therein to show such authority on the part of said Williamson.

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## No. 9.

The Court declares the law to be that under the evidence in this case, C. G. Williamson did not have authority to make an agreement to pay plaintiff's attorney's fees which would bind the defendants or either of them.

## No. 10.

The Court finds from the evidence that C. G. Williamson did not make agreement with plaintiff to pay the fees of her attorneys.

## No. 11.

The Court declares the law to be that it is admitted in this case Mern G. Welker, the husband of Bessie G. Welker received the injuries which resulted in his death at Shenandoah in the State of Iowa, that at the time of his death, the said Mern G. Welker was a citizen and resident of Shelby County, Missouri, and the plaintiff, Bessie G. Welker, Administratrix of the estate of said Mern G. Welker, deceased, was at the time of his death and at the time of the commencement of this suit a citizen and resident of said Shelby County, Missouri, that such being the admitted facts, this suit was improperly brought in Livingston County, Missouri, and that therefore the Circuit Court of Livingston County, Missouri, acquired no jurisdiction of the cause.

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## No. 12.

If the Court finds from the evidence that Mern G. Welker was in the employment of the Director General of Railroads, that he was a citizen and resident of Shelby County, Missouri, and that the injuries which resulted in his death were received at Shenandoah, Iowa, then any suit brought for the recovery of damages by his legal representative on account of his death could not be brought in the Circuit Court of Livingston County, Missouri.

## No. 13.

The Court declares the law to be that under the Federal Control Act and proclamations of the President of the United States made by authority of said Act, the property, rights and franchises of The Wabash Railway Company were taken from said Wabash Railway Company and at the time of the death of the said Mern G. Welker was not being operated by said Company but by the Federal Government and that during said time no suit or action of law could be brought against said Wabash Railway Company and that any action brought to recover damages on account of the death of the said Mern G. Welker could be brought against the Director General of Railroads only.

## No. 14.

The Court declares the law to be that a suit brought against the Wabash Railway Company as sole defendant and process issued, served and returned as against the Wabash Railway Company did not confer jurisdiction over the Director General of Railroads and was no notice to the Director General of Railroads of the pendency of such suit.

## No. 15.

The Court declares the law to be that notice of contract for attorney's fees directed to and served on the Wabash Railway Company was not notice to the Director General of Railroads of such contract.

## No. 16.

The Court declares the law to be that if this suit was brought against the Wabash Railway as sole defendant and process issued, served and returned as against the Wabash Railway Company as sole defendant and thereafter the Director General of Railroads settled and compromised said suit or cause of action of plaintiff herein, that movent Miles Elliott cannot recover against the Director General of Railroads.

The Court gave Instructions or declarations of law Numbers 8, 10, 14, 15, and 16.

The Court refused to give Instructions Numbers 2, 3, 4, 5, 6, 7, 9, 11, 12 and 13, as requested by defendants. To the action  
 165 of the Court in refusing to give said Instructions and each of them, the defendants at the time duly excepted and saved their exceptions. To the action of the Court in giving said Instructions Numbered 1, 8, 10, 14, 15 and 16, the movent at the time excepted and still excepts.

And thereafter, and on to wit, the 30th day of January, 1920, the same being the sixteenth day of the January Term, 1920, of said court, the parties hereto being present by counsel, the court renders judgment in said cause and the following proceedings were had and made of record, to wit:

BESSIE G. WELKER, Administratrix of the Estate of Mern G. Welker, Deceased, Plaintiff.

VS.

WABASH RAILWAY COMPANY and WALKER D. HINES, United States Director General of Railroads, Defendants; Miles Elliott, Movent and Petitioner.

*Judgment.*

Now at this day this cause coming on for final hearing and determination by the court, the court having heretofore heard the  
 166 evidence herein and being now fully and sufficiently advised in the premises, doth find the issues herein in favor of Miles Elliott, Movent and Petitioner, and against defendant, Wabash Railway Company, in the sum of Four Thousand One Hundred Sixty-two Dollars and Eighty-five Cents.

It is therefore ordered and adjudged by the court that Miles Elliott, Movent and Petitioner, have and recover of defendant, Wabash Railway Company, the said sum of Four Thousand One Hundred Sixty-two Dollars and Eighty-five Cents (\$4,162.85), with interest from this 30th day of January, 1920, at the rate of six per cent per annum, together with his costs in this behalf expended and that execution issue therefor, and the court doth find the issues in favor of defendant, Walker D. Hines, United States Director General of Railroads and that he go hence and recover of Miles Elliott, Movent and Petitioner, his costs in this behalf expended and that execution issue therefor."

And thereafter, and on the 30th day of January, 1920, the same being the sixteenth day of the regular January Term, 1920, of the Circuit Court within and for Livingston County, Missouri, and at the same term of court at which and within four days after said Judgment was rendered, the defendant, Wabash Railway Company, by counsel, filed in the office of the Clerk of said court its Motion for a New Trial, which said motion is in the words and figures following:

*Motion for New Trial.*

Comes now the defendant, The Wabash Railway Company, and for its separate motion for a new trial herein moves the court to set aside the finding and judgment rendered herein on the motion of Miles Elliott, movant, and grant it a new trial of said cause for the following reasons, to wit:

First. Because the court had not jurisdiction of this defendant.

Second. Because the court had not jurisdiction of the cause of action sued on in this cause and no jurisdiction of the cause of action on movant for attorneys' fees on his motion here.

Third. Because under the law this defendant could not be legally sued in Livingston County, Missouri, at the time this suit was brought and at the time movant's motion was filed herein.

Fourth. Because under the Federal Control Act the property rights and franchises of this defendant were taken from it and by proclamations of the President of the United States were under the exclusive control of the Federal Government and particularly under the control of the Director General of Railroads.

Fifth. Because the return of process as made by the Sheriff of Livingston County was illegal and insufficient to confer jurisdiction over this defendant and of the cause of action stated in plaintiff's petition and in movant's motion.

Sixth. Because the court erred in over-ruling the objections made by this defendant at the commencement of this trial to the introduction of any evidence in the case upon the ground and for the reasons that this court had no jurisdiction over this defendant and of the cause of action stated in said motion of movant herein.

Seventh. Because the court erred in refusing the demurrer to the evidence tendered by this defendant at the close of movant's evidence.

Eighth. Because the court erred in refusing the peremptory instructions tendered by this defendant at the close of all of the evidence in the case directing a verdict and finding in favor of the defendant.

Ninth. Because the court admitted over the objections and exceptions of this defendant illegal and incompetent testimony offered by plaintiff.

Tenth. Because the court erred in refusing to admit legal, competent, relevant and material evidence offered by this defendant.

Eleventh. Because the court erred in giving instructions Number 2, 3, 4, 5, and 7, on the part of movant.

169 Twelfth. Because the court erred in refusing to give Instructions Numbers 2, 3, 4, 5, 6, 7, 9, 10, 11, 12 and 13, requested by this defendant.

Thirteenth. Because the court erred in modifying Instructions Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, requested by this defendant and giving the same as modified.

Fourteenth. Because the finding and judgment of the court is against the evidence and the greater weight of the evidence.

Fifteenth. Because the finding and judgment should have been for this defendant.

Sixteenth. Because the finding and judgment of the court is excessive.

N. S. BROWN,  
W. W. DAVIS,  
S. J. & G. C. JONES,  
*Attorneys for Defendant.*

And thereafter, and on the 30th day of January, 1920, the same being the sixteenth day of the regular January Term of said court, and at the same term of court at which and within four days after said judgment was rendered, the defendant, Wabash Railway Company, by counsel, filed in the office of the Clerk of said court its motion in arrest of judgment, which said motion is in the words and figures following, to-wit:

170 *Motion in Arrest of Judgment.*

Comes now the defendant, the Wabash Railway Company, and moves the court to arrest the judgment herein rendered on the motion of movent, Miles Elliott, for the following reasons, to-wit:

First. Because the court has no jurisdiction over this defendant or over the cause of action alleged in plaintiff's petition and of the cause of action alleged in movent's motion herein.

Second. Because the record is insufficient to support a verdict and finding against this defendant.

Third. Because the motion of movent herein fails to state facts sufficient to constitute a cause of action against this defendant.

N. S. BROWN,  
W. W. DAVIS,  
S. J. & G. C. JONES,  
*Attorneys for Defendant.*

*Order Overruling Motions.*

And thereafter, and on said 30th day of January, 1920, the same being the sixteenth day of the regular January Term of the Circuit Court within and for the County of Livingston, State of Mis-

171      souri, the parties hereto being present by counsel, and defendant's motion for a new trial is taken up by the court by agreement and by the court over-ruled.

To which action and ruling of the court the defendant, Wabash Railway Company, by counsel, then and there duly excepted at the time and still excepts.

And thereupon, on said 30th of January, 1920, the defendant's motion in arrest of judgment is taken up by the court and by the court considered and over-ruled.

To which action and ruling of the court the defendant, Wabash Railway Company, by counsel, then and there duly excepted at the time and still excepts.

#### *Appeal.*

And thereafter, and on the said 30th day of January, 1920, the same being the sixteenth day of the regular January Term, 1920, of the Circuit Court within and for Livingston County, Missouri, comes the defendant, Wabash Railway Company, and files application and affidavit in appeal praying an appeal to the Kansas City Court of Appeals, and said defendant's appeal bond is by the court fixed at the sum of Eight thousand four hundred dollars, to be

172      given within ten days after the adjournment of this term of this court, to be approved by the Clerk in vacation, and said defendant is granted until on or before the last day of the next term of this court in which to file bill of exceptions hereon and said defendant's affidavit and application is taken up and being found to be sufficient and in due form of law, an appeal is hereby granted to defendant to the Kansas City Court of Appeals of the State of Missouri."

#### *Stipulation.*

It is hereby stipulated and agreed by and between the parties hereto, by counsel, that the within and foregoing bill of exceptions is true and correct, and that the same may be signed by the Judge of the Circuit Court of Livingston County, Missouri, and trial Judge herein, and approved and allowed, filed with the Clerk of said court and made and entered of record.

KIMBRELL & O'DONNELL  
MILES ELLIOTT,

*Counsel for Plaintiff*  
W. W. DAVIS,  
S. J. & G. C. JONES,  
*Counsel for Defendant*

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#### *Judge's Certificate.*

This is to certify that on this 8th day of September, 1920, and within the time heretofore granted by the court for filing the same, comes the defendant, Wabash Railway Company, by counsel, and presents and tenders the within and foregoing record as its true

complete and correct bill of exceptions herein, and prays that the same be allowed, approved and signed by the judge of said court, and trial judge herein, filed with the Clerk of said court and made and entered of record in the cause above entitled, which is accordingly done the day and year last above written.

ARCH B. DAVIS,

*Judge, Circuit Court.*

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## In the Supreme Court of Missouri.

Be it remembered That, heretofore, on the 21st day of July, 1921, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri a petition for a writ of certiorari, and suggestion in support thereof, in a cause between State of Missouri at the Relation of The Wabash Railway Company, Relator, and Francis H. Trimble, Ewing C. Bland and Henry L. Arnold, Judges of the Kansas City Court of Appeals, Respondents, No. 22,999, as evidenced by the following record entry, to-wit:

In the Supreme Court of Missouri, April Term, 1921.

Thursday, July 21, 1921.

STATE ex Rel. WABASH RAILWAY COMPANY, Relator,

vs.

FRANCIS H. TRIMBLE et al., J.J., Respondents.

Comes now the said relator, by attorney, and files its petition for a writ of certiorari herein, and therewith files suggestions in support thereof.

Which said petition and suggestions in support thereof are in the words and figures following, to-wit:

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## In the Supreme Court of Missouri.

STATE OF MISSOURI at the Relation of THE WABASH RAILWAY COMPANY, Relator,

vs.

FRANCIS H. TRIMBLE, EWING C. BLAND, and HENRY L. ARNOLD  
Judges of the Kansas City Court of Appeals, Respondents.

To Miles Elliott, movent in the above entitled cause, or Kimbrell O'Donnell, his attorneys of record:

You are hereby notified that a Petition for a Writ of Certiorari together with all Exhibits and suggestions in regard thereto will be presented to the Supreme Court of the State of Missouri at Jefferson

City on Wednesday the 27th day of July, 1921, praying said Court to quash the judgment of the Kansas City Court of Appeals in the case of Miles Elliott Movent, Respondent, Bessie G. Welker, Administratrix of the Estate of Mern G. Welker, deceased, Plaintiff vs. The Wabash Railway Company, Appellant, No. 13,826.

N. S. BROWN,  
W. W. DAVIS,  
S. J. & G. C. JONES,  
*Attorneys for Relator.*

The undersigned attorneys of record for Miles Elliott, Movent, Respondent in the case of Miles Elliott, Movent, Respondent, Bessie G. Welker, Administratrix of the estate of Mern G. Welker, deceased vs. The Wabash Railway Company, Appellant, No. 13,826 decided in the Kansas City Court of Appeals at the March Term, 1921 hereby acknowledge receipt of a true copy of this Notice and of the Petition for a Writ of Certiorari together with all Exhibits and Suggestions in regard thereto.

This 20th day of July, 1921.

KELLY, BUCHHOLZ, KIMBRELL &  
O'DONNELL.

*Attorneys for Miles Elliott, Movent, Respondent.*

In the Supreme Court of Missouri.

STATE OF MISSOURI at the Relation of THE WABASH RAILWAY COMPANY, Relator.

vs.

FRANCIS H. TRIMBLE, EWING C. BLAND, and HENRY L. ARNOLD,  
Judges of the Kansas City Court of Appeals, Respondents.

*Petition for Writ of Certiorari.*

Relator states that Respondents at all the times herein mentioned were and still are the Judges of the Kansas City Court of Appeals.

Relator further states that at the March Term, 1921 there was pending in the Kansas City Court of Appeals on appeal from the Circuit Court of Livingston County, Missouri a certain cause wherein Miles Elliott, Movent and Petitioner, was Respondent, Bessie G. Welker, Administratrix of Mern G. Welker, deceased was plaintiff and the Relator, The Wabash Railway Company was Appellant; which said cause, as appears from the record and facts disclosed in the opinion of the Court of Appeals arose under the following circumstances, to-wit:

On April 2nd, 1918 while the Wabash Railway Company was in charge of the Federal Government under the Federal Control Act and was being operated by the Director General of Railroads, Mern G. Welker, a brakeman in the employ of the Director General of Railroads, was killed at Shenandoah, Iowa. Letters of Administra-

tion on his estate were by the Probate Court of Shelby County granted to Bessie G. Welker, his widow, he at the time of his death being a resident of Shelby County.

On May the 17th, 1918 Bessie G. Welker, as such Administratrix entered into a contract with Miles Elliott, an attorney to represent her in investigating, settling or compromising her claim against the

41 Wabash Railway Company on account of the death of her husband and agreeing to pay him Fifty (50%) per cent of all moneys received whether by suit or compromise.

On the 24th day of May, 1918 Mr. Elliott caused to be served on W. R. Stepp, the agent of the Director General at Chillicothe in charge of the Railway Station a notice addressed to "The Wabash Railway Company" reciting the substance of his contract with Mrs. Welker.

On the 5th day of June, 1918 Mr. Elliott filed suit in the Circuit Court of Livingston County, Missouri in which Bessie G. Welker Administratrix of the estate of Mern G. Welker, deceased, was plaintiff and the Wabash Railway Company was sole defendant to recover damages on account of Mr. Welker's death.

After said suit was filed one C. G. Williamson, representing the Director General of Railroads compromised said suit with Mrs. Welker by paying her Four Thousand (\$4,000.00) Dollars damages plus the sum of One Hundred Sixty-two Dollars Eighty-five Cents (\$162.85) to cover funeral expenses. The record shows that said sum was paid out of Federal funds and on account of the Director General. A written stipulation evidencing said settlement signed by Mrs. Welker in her capacity as plaintiff and by Mr. Williamson as counsel was filed at the January Term, 1919 of the Circuit Court of Livingston County.

After the filing of said Stipulation Mr. Elliott filed in said cause Motion entitled "Motion to Enforce Attorney's Lien" in said Motion he asked to have his lien or claim for attorney's fees enforced against the Wabash Railway Company.

At the April Term of said Court Mr. Elliott by leave of Court filed an amended Motion to enforce his attorney's lien by making Walker D. Hines Director General of Railroads a defendant therein jointly with the Wabash Railway Company and which Amended Motion recited that the cause had been settled for the sum of Four Thousand (\$4,000.00) Dollars, together with One Hundred Sixty-two Dollars Eighty-five Cents (\$162.85) for funeral expenses

42 and asking for the enforcement of a lien upon the cause of action against both defendants in the sum of Four Thousand One Hundred Sixty-two Dollars Eighty-five Cents (\$4,162.85).

By way of answer to said Motion Relator filed a plea in abatement to the jurisdiction of the Court over it alleging that at the time of Mr. Welker's death it did not operate or control said Railway and was not in the possession of the property, rights and franchises of said Wabash Railway Company but that the same were in the possession of the Federal Government under the Federal Control Act and were being operated by the Director General of Railroads and that at said time it did not have or maintain an office

in Livingston County, Missouri in charge of an agent upon whom process could be served and that the process served in said cause was not served on an agent of said Relator and also denying that any person authorized to represent it had made any settlement of said cause with said Administratrix and denied that it paid any money in settlement of said cause of action and further denying that it had any notice or knowledge of the alleged contract between Mrs. Welker and Mr. Elliott or that notice of such contract was served on any agent of Relator.

To said Motion the Director General of Railroads filed a separate Answer containing a plea in abatement and to the jurisdiction of the Court alleging that at the time of the happening of the events mentioned in the petition filed in said suit that the property of the Wabash Railway Company was in the sole possession and under the control of the Federal Government and not under the control and management of Relator and denying that any process was issued or served on any agent of said Director General.

Upon the trial of the cause in the Circuit Court of Livingston County the Court found in favor of Mr. Elliott as against the Wabash Railway Company and rendered judgment in his favor in the sum of Four Thousand One Hundred Sixty-two Dollars Eighty-five Cents (\$4,162.85), at the same time finding in favor of the Director General of Railroads.

43 In due time Relator perfected an appeal from said judgment to the Kansas City Court of Appeals; said cause was submitted to said Court of Appeals at the March Term, 1921 thereof. Upon said appeal there was presented to said Court the following issues:

1. Whether or not under the acts of Congress providing for Federal Control of Railroads and the Proclamations of the President and Proclamations and Orders of the Director General of Railroads the Wabash Railway Company was liable to Mrs. Welker as Administratrix for damages on account of the death of her husband and to Mr. Elliott for attorney's fees, it appearing that at the time of Mr. Welker's death he was an employee or servant of the Director General and at said time the Wabash Railway Company was in charge of the Federal Government and being operated and controlled solely by the Director General of Railroads. On such issue said Court of Appeals in an opinion delivered May 23rd, 1921 held that said Railway Company was liable, a true copy of which Opinion is hereto attached marked "Exhibit A." Relator contends that the Court of Appeals in so holding failed or refused to follow the last controlling decisions of the Supreme Court of this State as announced in the case of Adams vs. Q. O. & K. C. Railway Company 229 S. W. 790.

2. Whether or not Mr. Elliott by a mere Motion filed in said cause after a Stipulation had been filed for its dismissal could enforce his lien or claim for attorney's fees, the cause of action being extinct by reason of said settlement and the filing of said Stipulation. The Court of Appeals in said Opinion held that he could intervene by mere Motion and assert his claim for attorney's fees. In so holding

Relator contends the Court of Appeals failed or refused to follow the last controlling decisions of the Supreme Court of this State as announced in *Mills vs. Metropolitan Ry. Co.* 221 S. W. 1; *Waite vs. Ry.* 204 Mo. 491; *O'Connor vs. Transit Co.* 198 Mo. 622; *Taylor vs. Transit Co.* 198 Mo. 715.

3. Whether or not under the facts as disclosed by the record Mr. Elliott could recover more than One-Half of the consideration actually paid for said settlement, that is to say, more than One-Half of Four Thousand (\$4,000.00) Dollars, the amount actually paid by way of damages plus One Hundred Sixty-two Dollars Eighty-five Cents (\$162.85) for funeral expenses. The Court

of Appeals on such issue found in favor of Movant Mr. Elliott. In so finding Relator contends that the Court of Appeals failed or refused to follow the last previous controlling decisions of the Supreme Court of this State as announced in the case of *Whitecotton vs. R. R.* 250 Mo. 624 and said holding in violation of Section 691 R. S. 1919.

Within the time prescribed by the rules of said Kansas City Court of Appeals, Relator filed its Motion for a rehearing, a copy of which Motion is hereto attached marked "Exhibit B;" which Motion in written Opinion by Respondent Judge Bland, concurred in by Respondent Judge Arnold, was on the 27th day of June, 1921 overruled, a copy of the Opinion and Order overruling said Motion is hereto attached marked "Exhibit C" and Exhibit D" respectively.

Respondent Judge Trimble, the Presiding Judge of said Court, in a written Opinion Dissented from the majority opinion overruling said Motion. A copy of Judge Trimble's dissenting opinion is hereto attached marked "Exhibit E."

Relator further states that in due time it filed a Motion in said Kansas City Court of Appeals to transfer said cause to the Supreme Court of the State of Missouri, a copy of which Motion is hereto attached marked "Exhibit F;" which Motion was on the 7th of July, 1921 by said Respondents overruled, a copy of the Order overruling said Motion is hereto attached marked "Exhibit G."

Wherefore Relator prays this Court to issue its Writ of Certiorari directing Respondents to certify and transfer to this Court all of the records, Briefs, Motions and all other papers pertaining to the case of Miles Elliott, Movant, Respondent, Bessie G. Welker, Administratrix of the estate of Mern G. Welker, deceased, Plaintiff vs. The Wabash Railway Company Appellant, No. 13826 and that this Court quash said judgment and opinion of said K. C. Court of Appeals and for such other and further Orders as may be just and proper in the premises.

N. S. BROWN,  
W. W. DAVIS,  
S. J. & G. C. JONES,  
*Attorneys for Appellant.*

45 STATE OF MISSOURI,  
County of Carroll, ss:

S. J. Jones, being duly sworn upon his oath says he is agent and attorney for Relator in the above entitled cause and that he makes this affidavit for and on behalf of Relator.

Affiant further states that the matters and things alleged in the above and foregoing petition are true, according to the best of his knowledge, information and belief.

[SEAL.]

S. J. JONES,

Subscribed and sworn to before me this 20th day of July, 1921.  
My commission expires December 4, 1922.

SCOTT R. TIMMONS,  
Notary Public.

46 In the Supreme Court of Missouri.

STATE OF MISSOURI at the Relation of THE WABASH RAILWAY COMPANY, Relator,

VS.

FRANCIS H. TRIMBLE, EWING C. BLAND, and HENRY L. ARNOLD,  
Judges of the Kansas City Court of Appeals, Respondents.

*Suggestions in Support of Petition for Writ of Certiorari.*

1. The opinion of the Kansas City Court of Appeals in holding that Relator, The Wabash Railway Company was liable to Mr. Elliott on account of his contract with Bessie G. Welker, Administratrix for attorney's fees is indirect conflict with the late case of Adams vs. Q. O. & K. C. R. R. Co., 229 S. W. 790.

In our opinion that case exactly sustains the contention we make, namely, that under Federal control the Railway corporation was not liable. We quote from the opinion as follows:

"Second. That after Order No. 50 was promulgated on October 28, 1918 by the Director General of Railroads, the railroad company itself was no longer subject to suit for personal injuries arising during federal control of its railroad, whether such injury happened after or before the date of said Order No. 50. This question was so fully yet concisely, considered by the federal Court of Appeals, this circuit, in *Mardis vs. Hines* (C. C. A.) 267 Fed. 171, opinion by Hook, J. that we content ourselves with referring to the opinion in that case, as expressive of our views. Our Springfield Court of Appeals, in *Cravens vs. Hines* 218 S. W. 912 came to the same conclusion. The acts of Congress, proclamations of the President, and orders of the Director General of Railroads are quite fully set out in our opinion in case of *Kersten vs. Hines* 223 S. W. 586. But said Order No. 50 especially so far as it relates to injuries occurring prior to its date, has been held void in the following cases: *Franke vs. Railroad* 170

Wis. 71, 173 N. W. 701 three judges dissenting; McGregor vs. Railway (N. D.) 172 N. W. 841, 4 A. L. R. 1635, one judge dissenting; Parkinson vs. Railroad (S. D.) 178 N. W. 293; Mobile Railroad vs. Jobe (Miss.) 84 South 910; Lavalley vs. Railroad 143 Minn. 74, 172 N. W. 918 4 A. L. R. 1659. We cannot concur in the reasoning of the opinions in these cases; we believe that they take too narrow a view of the powers of the President and Director General of Railroads under said Acts of Congress."

That the Railway corporation could not be sued for a cause of action arising under Federal control is held in the following Federal cases to which we call attention and from which we quote:

47 Mardis vs. Hines, 258 Fed. 945 where the Court after quoting from the case of Northern Pacific Ry. Co. vs. North Dakota, 250 U. S. 135 said:

"From the time that the Proclamations of the President became effective on December 28th, 1917, the Director General, as the representative of the President has been in the exclusive possession and control of the railroads. The railroad company exercises no control whatever. The railroad is operated under the orders of the Director General. The Railroad Company has nothing to do with such operation. When the Director General assumed control, all the employees on the railroad ceased to be employees of the railroad company and became employees of the Director General. At that time the relation of master and servant ceased to exist between the employees operating the railroad and the railroad company, that relation then became and still exists between such employees and the Director General."

This being the law, then it follows that the suit was not only improperly brought against the Wabash Railway Company in the first instance, but it could not be maintained against The Wabash. Not only that, but it follows that the service of the notice of Mr. Elliott's contract on W. R. Stepp, the Station Agent, was not notice to the Wabash Railway Company. He was not in the employ of The Wabash Railway Company; he was not the agent of the Wabash Railway Company; he was not in charge of an office of The Wabash Railway Company, but he was in fact an employee of the Director General and the office that he was in charge of and the business he was conducting was that of the Government. It would be illogical indeed to say that if Mr. Stepp was not the agent of the Wabash Railway Company but the agent of the Federal Government that notice served on him would be notice to the Wabash Railway Company. The relation of principal and agent not existing between Mr. Stepp and The Wabash Railway Company, then necessarily notice served on him did not constitute notice on the Wabash Railway Company.

In Hines vs. Dahn 267 Fed. l. c. 110, we quote as follows:

"It seems plain to us that the President has authority and duty through Newton D. Baker, Secretary, take possession and assume

control of each and every system of transportation and the operation thereof; that the possession, control, operation and utilization of such transportation systems undertaken by the President was directed by him to be exercised by and through the Director General. It would be unconstitutional and contrary to the law of the land to hold that the railroad corporation, in this case the Illinois Central Railroad Company, as a corporate entity should be liable for an act done or omitted to be done in the operation of the transportation system by another party over which it has no authority or control. (Many cases cited.)"

18 "General Order No. 50 promulgated by the Director General October 28th, 1918 directing that actions at law, suits in equity and other proceedings thereafter brought in any court based on contract binding upon the Director General, claim for death or injury to person, or for loss and damage to property arising since December 31, 1917 and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General, which action, suit or proceeding but for federal control might have been brought against the carrier company shall be brought against William G. McAdoo, Director General, and not otherwise, is an interpretation of the laws regulating Federal Control of Railroads, by that department of the government charged with the duty of executing the same, and such interpretation has always been regarded by the Courts with great respect. (Then follows the citation of numerous cases holding to that view.)"

The Court however refers to the fact that there are other decisions putting a different construction upon the law relating to Federal Control, but reach as the conclusion that the reasoning upon which they are based is not persuasive or sound.

As being directly in point and decisively holding that while Federal Control existed, that a railroad corporation could not be sued we refer the Court to *Halbert vs. Baltimore & Ohio R. R. Co.*, 259 Fed. 361. In that case the corporation was sued. The Court said, *l. c.* 364:

"My conclusion is that liabilities due to operation by the agencies having possession by virtue of the act created and authorizing Federal Control are not liabilities of the railroad company that have been ousted of such possession and control, that suits cannot be brought against such Companies and prosecuted to a judgment against them and that such claimants are limited to a right of action against the Federal control agency and of such sources of payment as are provided by the Federal Control Act. (Cases Cited.)"

This being the law the Wabash Railway Company could not be sued in the first instance. It was not liable to Mrs. Welker on account of the death of her husband, if not liable to her, then of course it is not liable to Mr. Elliott for his attorney's fees.

There is a late decision by the Supreme Court of the United States in the case of Walker D. Hines, Director General of Railroads, plaintiff in error vs. H. F. A. Ault. We have not seen an official copy of the opinion but have examined an excerpt from it. In that case however the Missouri Pacific Railroad was sued before a Justice of Peace in the State of Arkansas. It suffered a default judgment then appealed to the Circuit Court where it moved to substitute as defendant the Director General of Railroads. The Court refused to make the substitution but joined the Director General with the Railway Company as defendant and entered judgment against both. It was held that this could not be done. From our understanding of that Opinion the holding is in harmony with Adams vs. R. R. supra, that in no event while under Federal control can the Railway Company be made liable for a cause of action arising while Federal control exists.

2. Under the Federal Control Act all servants, agents and employees of the Railway Company ceased to be employees of the corporation and became employees, agents and servants of the Federal Government and therefore service of a copy of Mr. Elliott's contract on Mr. Stepp and the service of process upon him in the case of Bessie G. Welker, Administratrix vs. The Wabash Railway Company did not confer jurisdiction over said Railway Company.

See,

Federal Control Act, Section 10.

U. S. Compiled Statutes 3115<sup>34</sup>.

Orders of Director General Nos. 50 and 50-A.

Mardis vs. Hines 258 Fed. 945.

Rutherford vs. U. P. R. R. 254 Fed. Rep. 880.

Hines vs. Dahn 267 Fed. Rep. 111.

Blevins vs. Hines 264 Fed. Rep. 1005.

Halbert vs. R. R. 259 Fed. Rep. 361.

3. The Wabash Railway Company did not compromise or settle the suit of Bessie G. Welker, Administratrix vs. The Wabash Railway Company. The settlement was made by the Director General of Railroads. It should be borne in mind that Mr. Welker was in the employ of the Director General, the cause of action on account of his death arose while the road was under Federal control. Mr. Elliott's contract for attorney's fees was made while the road was under Federal control. The suit was brought while the Railroad was under Federal control. All of the events giving rise to the case

and thereafter connected with it having arisen and transpired while under Federal control then we contend that under the decisions of this Court and of the Federal Courts that the Wabash Railway Company was not liable. This is the view of Judge Trimble in his dissenting opinion to which we respectfully call the Court's attention the same being hereto attached marked "Exhibit E". Judge Trimble calls attention to the fact that there is no question but that the Director General paid the consideration that settled the case; that the release which plaintiff signed concedes

that such is the fact, the draft which plaintiff received shows that the money was paid by the Director General; the release recites "in consideration of the sum of Four Thousand (\$4,000.00) Dollars to me in hand paid by W. G. McAdoo, Director General of Railroads operating the Wabash Railroad". The draft bore the superscription "United States Railroad Administration, W. G. McAdoo, Director General of Railroads", was signed "Wabash Railroad, Federal Account, F. L. O'Leary, Federal Treasurer."

4. The opinion of the Court of Appeals holding that Mr. Elliott could intervene and enforce his lien on the cause of action by a Motion after the case had been compromised and a Stipulation for its dismissal was filed, is in conflict with the case of *Mills vs. Metropolitan Street Railway Co.*, 221 S. W. Page 1 and cases therein cited. We quote from that case as follows:

"In the absence of fraud or collusion however a settlement made by the client extinguishes the cause of action and being wiped out it ceased to be the subject of prosecution. This is so because the cause of action is the property of the client and not the attorney and he has an absolute right to make such settlement or adjustment of it in good faith as he thinks best regardless of the wishes of his attorney. (Cases cited.) The lien is subject to this right and if on a percentage basis is liquidated by the exercise thereof. After an honest settlement made by the client, his cause of action being thereby determined the attorney, if his lien has been disregarded, is of necessity remitted to an independent action against the defendants. *Yonge vs. Transit Co.*, 109 Mo. App. 235, 246, 84 S. W. 184. Such independent action may be one at law for the value of the lien of which he is deforced, corresponding to the common law action of trespass on the case. *Taylor vs. Transit Co.*, 198 Mo. 715, 730, 97 S. W. 155. Or, possibly, if he so elects, the attorney may instead bring a suit in equity to foreclose his lien."

5. Mr. Elliott's contract with Mrs. Welker was for Fifty (50%) per cent of the amount he received by way of suit, compromise or otherwise. The amount actually paid was Four Thousand (\$4,000.00) Dollars in full for damages on account of her husband's death, together with the further sum of One Hundred Sixty-two Dollars Eighty-five Cents (\$162.85) to cover funeral expenses. We contend that even if Mr. Elliott was entitled to recover that 51 he could have only recovered Fifty (50%) per cent of the amount actually paid in settlement of the case. The opinion of the Court of Appeals holding that he could recover an equal amount to that paid Mrs. Welker is in conflict with the opinion of this Court in *Whitcotton vs. R. R.*, 250 Mo. 624 and also violates the provisions of Section 691 R. S. 1919.

We respectfully submit that under the facts disclosed under the record in this case and the facts narrated in the original Opinion of the Court of Appeals and in the dissenting Opinion of Judge Trimble that the Opinion of the Court of Appeals is in conflict with the controlling Opinions of this Court, to which attention has been

called in these suggestions and in the Petition herein. We therefore respectfully pray that a Writ of Certiorari issue as in such cases provided.

Respectfully submitted,

N. S. BROWN,  
W. W. DAVIS,  
S. J. & G. C. JONES,  
*Attorneys for Relator.*

And thereafter, and on the 29th day of October, 1921, the following proceedings were had and entered of record in said cause, to-wit:

52 In the Supreme Court of Missouri, October Term, 1921.

In Banc.

Saturday, October 29th, 1921.

STATE OF MISSOURI at the Relation of WABASH RAILWAY COMPANY  
Relator,

vs.

FRANCIS H. TRIMBLE, EWING C. BLAND, and HENRY L. ARNOLD  
Judges of the Kansas City Court of Appeals, Respondents.

Certiorari.

Now at this day, the Court having considered and fully understood the petition heretofore filed by the said relator for a writ of certiorari herein, it is ordered and adjudged by the Court that said writ be, and the same is hereby denied.

STATE OF MISSOURI, *set:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the above and foregoing is a full, true and complete transcript of the petition for a writ of certiorari and suggestions in support thereof, and of all record entries, in the cause of State of Missouri at the Relation of The Wabash Railway Company Relator, vs. Francis H. Trimble, et al., Judges of the Kansas City Court of Appeals, Respondents, No. 22,999, as fully as the same appear on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at my office in the City of Jefferson, this 23rd day of November, 1921.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN, *Clerk.*

Endorsed on cover: File No. 28,603. Missouri Supreme Court Term No. 648. Wabash Railway Company, petitioner, vs. Miles Elliott. Petition for writ of certiorari and exhibit thereto. Filed December 13th, 1921. File No. 28,603.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Kansas City Court of Appeals, State of Missouri, Greeting:

Being informed that there is now pending before you a suit in which Bessie G. Welker, Administratrix of the Estate of Mern G. Welker, deceased, was Plaintiff, Wabash Railway Company was Appellant, and Miles Elliott, Movant and Petitioner, was Respondent, No. 13,826, which suit was removed into the said Kansas City Court of Appeals by virtue of an appeal from the Circuit Court of Livingston County, Missouri, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Kansas City Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act therein as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-fifth day of January, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,

*Clerk of the Supreme Court of the United States.*

[Endorsed:] File No. 28,603. Supreme Court of the United States, No. 648, October Term, 1921. Wabash Railway Company vs. Miles Elliott. Writ of Certiorari.

In the Kansas City Court of Appeals, State of Missouri, March Term, 1921.

No. 13826.

BESSIE G. WELKER, Administratrix of the Estate of Mern G. Welker, Deceased, Plaintiff,

vs.

WABASH RAILWAY COMPANY, Appellant; MILES ELLIOTT, Movant & Petitioner, Respondent.

*Stipulation.*

Whereas the Supreme Court of the United States, under date of the 25th day of January, A. D. 1922, did issue its writ of certiorari in the above entitled cause commanding the Judges of the Kansas City Court of Appeals, State of Missouri, to send unto said Supreme Court the record and proceedings in said cause, it is this 17th day of

February, A. D. 1922, stipulated by and between said Wabash Railway Company and said Miles Elliott, acting by and through their several representatives or attorneys that the transcript of the record and proceedings in the above entitled cause as heretofore filed in the Supreme Court of the United States in connection with the petition for allowance of said writ of certiorari shall remain, be used as and constitute the transcript of the record and proceedings of said cause as fully and completely as though said transcript of the record and proceedings first mentioned has been returned pursuant to the command of said writ of certiorari.

It is further stipulated and agreed by the above named parties, their representatives or attorneys, that the Clerk of the Kansas City Court of Appeals, State of Missouri, shall attach a certified copy of this Stipulation to said original writ of certiorari and shall transmit all thereof to the Supreme Court of the United States as his return to said writ.

(Signed)

S. J. JONES,

*Attorney for Wabash Railway Company,  
Appellant and Petitioner.*

MARTIN J. O'DONNELL,

*Attorney for Miles Elliott,  
Movant and Respondent.*

February 17, 1922.

STATE OF MISSOURI, *scilicet*:

I, L. F. McCoy, Clerk of the Kansas City Court of Appeals, in obedience to the command of the foregoing writ, do hereby certify that the above and foregoing is a full, true and complete transcript of the stipulation filed by the parties thereto, in my office, on the 18th day of February, 1922, and I here return the same in lieu of a full transcript of the proceedings in said cause, according to the terms of said stipulation.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court hereto, at office in Kansas City, this 18th day of February, 1922.

[Seal of Kansas City Court of Appeals.]

L. F. MCCOY,  
Clerk.

[Endorsed:] File No. 28,603. Supreme Court U. S. October Term, 1921. Term No. 648. Wabash Ry. Co., Petitioner, vs. Miles Elliott. Writ of certiorari and return. Filed Feb. 24, 1922.

DEC 4 1922

WM. R. STANSBURY  
CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1922.

**WABASH RAILWAY COMPANY,**

Petitioner,

vs.

**MILES ELLIOTT,**

Respondent.

No. **225**

**On Writ of Certiorari to Kansas City Court of Appeals,  
State of Missouri.**

**BRIEF FOR PETITIONER.**

**FREDERIC D. MCKENNEY,**

**N. S. BROWN,**

Counsel for Petitioner.



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IN THE

**SUPREME COURT OF THE UNITED STATES.**

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OCTOBER TERM, 1922.

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WABASH RAILWAY COMPANY,  
Petitioner,  
vs.  
MILES ELLIOTT,  
Respondent.

226  
No. 648.

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On Writ of Certiorari to Kansas City Court of Appeals,  
State of Missouri.

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**BRIEF FOR PETITIONER.**

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**STATEMENT.**

This case is before the Court on writ of certiorari to the Kansas City Court of Appeals of the State of Missouri to review a judgment which affirmed a judgment of the Circuit Court of Livingston County, in that state, in favor of respondent, Miles Elliott, as petitioner or movant in the cause wherein Bessie

G. Welker, administratrix of the estate of Mern G. Welker, deceased, was plaintiff and Wabash Railway Company was defendant. The said suit was instituted and said judgment entered against petitioner while its railroad and properties were under Federal control.

The facts out of which the controversy arose are as follows:

On April 2, 1918, while the railroad properties of petitioner were in the possession of the Federal Government, and being operated by the Director General of Railroads, pursuant to the proclamations of the President and the provisions of the Federal Control Act, one Mern G. Welker, a brakeman, then in the employ of the Director General, was killed at Shenandoah, Page County, Iowa, while engaged in the performance of his duties as such employe and under circumstances which were alleged to create a legal liability for his death. Soon thereafter letters of administration on his estate were duly granted by the Probate Court of Shelby County, Missouri, to his widow, Bessie G. Welker.

At the time of the fatal accident, Mern G. Welker resided in Shelby County, Missouri, and at the time of the filing of the main case against petitioner, hereinafter mentioned, the plaintiff therein, Bessie G. Welker, as such administratrix, resided in said Shelby County (Rec., pp. 3, 24, 79).

On May 17, 1918, Bessie G. Welker, as such administratrix, entered into a contract with Miles Elliott (respondent herein), an attorney at law, to represent her in investigating and settling, or compromising, her supposed cause of action against petitioner on account of the alleged wrongful death of her husband, and agreeing to pay Elliott 50 per cent of all moneys received, whether by suit or compromise (Rec., p. 28).

On May 24, 1918, Elliott caused to be served on one W. R. Stepp, station agent of the Director General at Chillicothe, Livingston County, Missouri, a notice addressed to "Wabash Railway Company" reciting the substance of his contract with said administratrix (Rec., p. 29).

On June 5, 1918, Elliott, as attorney for said administratrix, caused to be filed in the Circuit Court of Livingston County, Missouri, the case in which Bessie G. Welker, administratrix of the estate of Mern G. Welker, deceased, was plaintiff, and the Wabash Railway Company, petitioner herein, was sole defendant, to recover damages on account of the alleged wrongful death of her deceased husband, on April 2, 1918 (Rec., p. 24).

On November 16, 1918, one C. G. Williamson, a claim agent, then employed by the Director General in his operation of the Wabash Railroad, settled and compromised the said alleged cause of action and paid

in settlement thereof the sum of \$4,000.00 as damages, and the sum of \$162.85 to cover funeral expenses. The said sum was paid to said administratrix by a bank draft drawn on the Third National Bank of St. Louis, Missouri, which bore the superscription, "United States Railroad Administration, W. G. McAdoo, Director General of Railroads," and was signed, "Wabash R. R., Federal Account, F. L. O'Leary, Federal Treasurer" (Rec., p. 66).

Thereupon the said administratrix executed and delivered to the said representative of the Director General a formal release of all claims and causes of action "by reason of injuries received by Mern G. Welker, brakeman on freight train, extra 2155, running between Stanberry, Missouri, and Council Bluffs, Iowa, such injuries resulting in his death at Shenandoah, Iowa, on or about the 2nd day of April, 1918." Said release also acknowledged the receipt by said administratrix "of W. G. McAdoo, Director General of Railroads, the sum of \$4,000.00, in full for the above agreement as recited" (Rec., p. 72).

After such settlement was made, and on January 11, 1919, Miles Elliott, the respondent herein, filed in the case brought by the administratrix against petitioner, and then pending in the Circuit Court of Livingston County, Missouri, a motion entitled, "Motion to Enforce Attorney's Lien," in which he prayed said Circuit Court to have his lien or claim for attorney's fees

under the provisions of Section 691, Revised Statutes of Missouri, 1919, adjudged and enforced against your petitioner, who was, at that time, the sole defendant in the suit (Rec., p. 27).

Section 691, Revised Statutes of Missouri, 1919, is as follows:

"In all suits in equity and in all actions or proposed actions at law, whether arising ex contractu or ex delicto, it shall be lawful for an attorney at law, either before suit or action is brought, or after suit or action is brought, to contract with his client for legal services rendered or to be rendered him for a certain portion or percentage of the proceeds of any settlement of his client's claim or cause of action, either before the institution of suit or action, or at any stage after the institution of suit or action, and upon notice in writing by the attorney who has made such agreement with his client, served upon the defendant or defendants, or proposed defendant or defendants, that he has such an agreement with his client, stating therein the interest he has in such claim or cause of action, then said agreement shall operate from the date of the service of said notice as a lien upon the claim or cause of action, and upon the proceeds of any settlement thereof for such attorney's portion or percentage thereof, which the client may have against the defendant or defendants, or proposed defendant or defendants, and cannot be affected by any settlement between the parties

either before suit or action is brought, or before or after judgment therein, and any defendant or defendants, or proposed defendant or defendants, who shall, after notice served as herein provided, in any manner, settle any claim, suit, cause of action, or action at law with such attorney's client, before or after litigation instituted thereon, without first procuring the written consent of such attorney, shall be liable to such attorney for such attorney's lien as aforesaid upon the proceeds of such settlement, as per the contract existing as hereinabove provided between such attorney and his client."

On March 7, 1919, Elliott filed in said suit in said Circuit Court an amended motion to declare and enforce his supposed attorney's lien by making Walker D. Hines, Director General of Railroads, a joint defendant with petitioner in such proceeding. This amended motion recites that during all the times therein mentioned the Wabash Railway Company and its railway were under the administration and control of the United States Railroad Administration and of the United States Director General of Railroads, under and by virtue of the Federal Control Act and other acts, and the proclamations of the President, dated December 26, 1917, and April 11, 1918, and that Walker D. Hines is Director General of Railroads under authority of such acts of Congress and proclamations of the President; that by his

General Order No. 50, the Director General of Railroads on November 1, 1918, ordered that he be made a party to all suits then pending against railroads upon any cause of action arising since December 31, 1917; that the action herein is such a suit (Rec., p. 31).

To Elliott's amended motion petitioner and the Director General of Railroads filed separate pleas in abatement and to the jurisdiction of the Circuit Court of Livingston County, Missouri, upon the grounds (1) that said suit was instituted against petitioner in violation of General Order No. 50 of the Director General; and (2) that the Circuit Court of Livingston County, Missouri, was without jurisdiction to hear and determine said suit for the reasons that Mern G. Welker, the deceased employe, was at the time of his alleged wrongful death a resident of Shelby County, Missouri, that the cause of action arose in Page County, Iowa, and that the plaintiff administratrix was, during all said times, a resident of Shelby County, Missouri, and therefore the filing of the said suit in the Circuit Court of Livingston County, Missouri, is contrary to, and in violation of, General Orders Nos. 18 and 18a of the Director General of Railroads, made and issued on April 9, 1918, and April 18, 1918, respectively (Rec., pp. 35, 36, 37, 38).

Upon the trial of the issues raised by Elliott's amended motion in the said suit in the Circuit Court of Livingston County, Missouri, the Court found the

issues in favor of Elliott, and rendered judgment in his favor and against petitioner in the sum of \$4,162.85; and, at the same time, found the issues in favor of the Director General of Railroads and against Elliott and rendered judgment in favor of said Director General (Rec., p. 39).

After unsuccessful motions for new trial and in arrest of judgment filed by petitioner, it perfected its appeal to the Kansas City Court of Appeals of the State of Missouri, and said cause was submitted to said Court of Appeals for decision at the March Term, 1921.

Thereafter on March 23, 1921, the said Court of Appeals rendered its opinion and judgment in said cause affirming the judgment of the Circuit Court of Livingston County, both as to the judgment against petitioner and as to the judgment in favor of the Director General (Rec., p. 3, et seq.).

In due time petitioner filed in said cause in said Court of Appeals, its motion for a rehearing which was by the Court overruled on June 27, 1921 (Rec., p. 17). Thereupon petitioner filed in said cause in said Court of Appeals its motion to transfer the said cause to the Supreme Court of the State of Missouri, which was by the Court overruled on July 7, 1921 (Rec., p. 21). In due time, and in accordance with local practice, petitioner filed in the Supreme Court of the State of Missouri its petition for writ of certiorari, wherein

petitioner prayed the said Supreme Court to require the record in said cause of action in said Court of Appeals to be certified to it for review and decision (Rec., p. 113). Thereafter, and on October 29, 1921, the Supreme Court of the State of Missouri entered its order denying said petition for certiorari (Rec., p. 122), and thereby the judgment of the Kansas City Court of Appeals in said cause became, by virtue of the statutes of the State of Missouri, the final judgment of the highest court of said state.

Thereafter on December 13, 1921, petitioner filed in this Honorable Court its petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri for a review and determination of said cause in accordance with the provisions of Section 237 of the Judicial Code as amended. Said petition was granted on January 25, 1922, the writ of certiorari was issued in the usual form to the said Kansas City Court of Appeals, and due return thereon was filed in this court on February 24, 1922.

## BRIEF OF THE LAW.

### I.

The Circuit Court of Livingston County, Missouri, was without jurisdiction to hear and determine the suit filed therein against petitioner during Federal control by Bessie G. Welker, administratrix, or by Miles Elliott, as petitioner or movant in said suit, because the said suit was instituted against petitioner upon a cause of action arising out of the operation of petitioner's railroad during Federal control and in violation of the provisions of General Order No. 50 of the Director General of Railroads, which said order was in full force and effect at the time Miles Elliott, respondent herein, filed in said suit his petition or motion for the enforcement of his alleged attorney's lien.

Missouri Pacific Railroad v. Ault, 256 U. S. 554;

Alabama and Vicksburg Railway Company v. Journey (No. 55, decided by this Court November 7, 1921).

### II.

The Circuit Court of Livingston County, Missouri, was without jurisdiction to hear and determine the

cause of action arising out of the death of Mern G. Welker, caused by the alleged negligence of the Director General of Railroads, because (1) the alleged wrongful death occurred and the alleged cause of action arose at Shenandoah, Page County, Iowa, during Federal control; (2) deceased at the time of his death resided in Shelby County, Missouri; and (3) plaintiff administratrix, at the time the cause of action accrued and at the time the said suit was filed in the Circuit Court of Livingston County, Missouri, was a resident of Shelby County, Missouri, and, therefore, the venue of said suit was laid (June 5, 1918) in the Circuit Court of Livingston County, Missouri, in violation of General Order of the Director General of Railroads No. 18, dated April 9, 1918, and General Order No. 18a, dated April 18, 1918.

Alabama and Vicksburg Railway Company v.  
Journey, *supra*.

### III.

The jurisdiction of the Circuit Court of Livingston County, Missouri, to hear and determine respondent's petition or motion filed in the Bessie Welker case necessarily depended upon the jurisdiction of said Circuit Court to hear and determine the main case. Respondent was merely an intervener in that suit.

Krippendorf v. Hyde, 110 U. S. 276;  
Rouse v. Letcher, 156 U. S. 50.

IV.

There was no cause of action against petitioner growing out of the death of Mern G. Welker caused by the alleged negligence of the Director General of Railroads, his agents or servants, while operating the railroad of the petitioner, and, therefore, respondent Elliott could not have, or have enforced, an attorney's lien upon a cause of action which did not exist.

Missouri Pacific Railroad v. Ault, *supra*.

## ARGUMENT.

The Circuit Court of Livingston County, Missouri, was without jurisdiction to hear and determine the suit filed therein on June 5, 1918, against petitioner during Federal control, by Bessie G. Welker, administratrix, or by Miles Elliott, as petitioner or movant in said suit, because the said suit was instituted against petitioner upon a cause of action arising out of the operation of petitioner's railroad during Federal control, and Elliott's motion was filed therein in violation of the provisions of General Order No. 50 of the Director General of Railroads.

The petition filed in the Circuit Court of Livingston County, Missouri, by Bessie G. Welker, administratrix of the estate of Mern G. Welker, deceased, against Wabash Railway Company, petitioner herein, shows upon its face (Rec., p. 24), that plaintiff's decedent on April 2, 1918, was killed at Shenandoah, Page County, Iowa, while engaged in his duties as a brakeman upon the freight train then being operated over the line of the Wabash Railroad; that the plaintiff in said suit was the widow and administratrix of the estate of Mern G. Welker under letters issued by the Probate Court of Shelby County, Missouri. The courts take judicial notice of the fact that the Wabash

Railroad, and all other principal lines of railroad in the United States, were taken under Federal control pursuant to the provisions of the President's proclamation of December 26, 1917, and the provision of the Federal Control Act of March 21, 1918.

Section 10 of the Federal Control Act permitted the enforcement of liabilities against carriers while under Federal control only "in so far as not inconsistent \* \* \* with any order of the President."

General Order No. 50 of the Director General of Railroads (Rec., p. 78) duly ordered "that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person or to loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control and operation of any railroad or system of transportation by the Director General of Railroads, which action, suit or proceeding, but for Federal control, might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures."

This order further provided that all actions and suits then pending against any carrier company for a cause of action arising since December 31, 1917, based

upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismiss the company therefrom.

This general order was in full force and effect at the time Elliott, the respondent herein, filed his petition or motion, in March, 1919, in the case of Bessie G. Welker, administratrix, etc. v. Wabash Railway Company in the Circuit Court of Livingston County, Missouri. To Elliott's amended motion, filed in said suit, both the railway company, petitioner herein, and the Director General of Railroads, filed their separate pleas in abatement and to the jurisdiction of the Circuit Court of Livingston County upon the ground, among others, that said proceeding in said court was in violation of the provisions of said General Order No. 50 of the Director General (Rec., pp. 35, 36, 37). By these separate pleas and by Elliott's amended motion (Rec., p. 31) the Circuit Court of Livingston County was fully advised of the fact that at the time of the fatal accident to Mern G. Welker, the Wabash Railroad was in the possession of, under the control of, and being operated by the Director General of Railroads pursuant to the proclamations of the President, and the terms of the Federal Control Act. Said Circuit Court was also thereby fully advised respecting the terms and provisions of General

Order No. 50 of the Director General of Railroads, yet, notwithstanding the provisions of said General Order, and the permission therein given to plaintiff, Bessie G. Walker, and to her attorney, Miles Elliott, respondent herein, they did not elect to substitute the Director General of Railroads as the party defendant in said suit and dismiss as to Wabash Railway Company, but, on the contrary, elected to make the Director General a joint defendant with the Railway Company by the amended motion filed by Elliott on March 7, 1919.

It seems obvious that under the provisions of General Order No. 50 of the Director General, the Circuit Court of Livingston County had no jurisdiction to proceed further in said cause against the Wabash Railway Company, petitioner herein, after the Director General was made a party defendant therein by the amended motion or petition filed by Elliott. The requirement of General Order No. 50 is explicit that if, and when, the Director General is made a party defendant to a suit then pending against the carrier company, the Court must dismiss the carrier company out of the suit. However, the Circuit Court of Livingston County, Missouri, and the Kansas City Court of Appeals, in its opinion affirming the judgment of said Circuit Court, held that General Order No. 50 of the Director General of Railroads was invalid and ineffec-

tive. On this point the Kansas City Court of Appeals said (Rec., p. 9):

"In reference to the contention that under General Order No. 50 of the Director General of Railroads the original suit of the administratrix against the Wabash Railway Company was improperly brought against the Railway Company instead of against the Director General, there is much conflict of authority as to whether said order is effective to require suits to be brought against the Director General, some cases holding that they must be brought in that manner on the ground that the Railway Company cannot be held liable for the acts or neglect of his servants or agents, but not on the ground that the Director General can deprive the courts of jurisdiction to determine whether the Railway Company in suits against it can be held for the acts or neglect of servants or agents of the Director General \* \* \* The order in effect declares 'carriers' not responsible for the conduct of the Director General and his agents. We will hereafter point out that the Director General has no right to issue orders limiting the jurisdiction of the courts. The courts still may lawfully issue and have served process to bring the Railway Company into court even though the petition bases the cause of action on the negligence of the servants of the Director General."

The foregoing opinion of the Kansas City Court of Appeals is squarely in conflict with the decisions of

this Court, rendered in *Missouri Pacific v. Ault*, 256 U. S. 554, and in Case No. 55, October Term, 1920, *Alabama and Vicksburg Railway Company v. Journey*, decided November 7, 1921.

In the former case this Court fully sustained the validity of General Order No. 50. In the course of the opinion it was there said (l. c. 561):

“All doubt as to how suits should be brought was cleared away by General Order No. 50, which required that it be against the Director General by name.

“As the Federal Control Act did not impose any liability upon the companies on any cause of action arising out of the operation of their systems of transportation by the Government, the provision in Order No. 50, authorizing the substitution of the Director General as defendant in suits then pending, was within his power; the application of the Missouri Pacific Railroad Company that it be dismissed from this action should have been granted.”

It is clear that by the rule declared in the *Ault* case the application of petitioner, raised by its plea in abatement and to the jurisdiction of the Circuit Court of Livingston County, to be dismissed from the action should have been granted, and, therefore, the judgment against it should be reversed.

## II.

The Circuit Court of Livingston County, Missouri, was without jurisdiction to hear and determine the cause of action arising out of the alleged wrongful death of Mern G. Welker while in the employ of the Director General of Railroads, because (1) the alleged wrongful death and the alleged cause of action arose at Shenandoah, Page County, Iowa, during Federal control; (2) deceased at the time of his death resided in Shelby County, Missouri; and (3) plaintiff administratrix, at the time the cause of action accrued and at the time the said suit was filed (June 5, 1918) in the Circuit Court of Livingston County, Missouri, was a resident of Shelby County, Missouri, and, therefore, the venue of said suit was laid in the Circuit Court of Livingston County, Missouri, in violation of General Order of the Director General of Railroads No. 18, dated April 9, 1918, and General Order No. 18a, dated April 18, 1918.

As heretofore stated, the petition filed by the administratrix in the principal cause showed on its face that her decedent was killed at Shenandoah, Page County, Iowa, on April 2, 1918, as the result of the alleged negligence of the agents and servants of the Director General; and it is conceded of record that plaintiff's decedent, Mern G. Welker, at the time of his death, was a resident of Shelby County, Missouri,

and that at the time the suit was filed in the Circuit Court of Livingston County, Missouri, the plaintiff administratrix was a resident of Shelby County, Missouri, and acting therein pursuant to letters of probate granted by the Probate Court of said Shelby County (Rec., pp. 3, 24, 79).

To Elliott's amended motion, filed in the principal cause in the Circuit Court of Livingston County, Missouri, the railway company, petitioner herein, and the Director General filed their separate pleas in abatement and to the jurisdiction of the court, and therein set up, among other things, the provisions of General Orders Nos. 18 and 18a of the Director General. These orders were introduced in evidence (Rec., p. 77) and the trial court was requested by each of the defendants to make the following declaration of law upon the facts conceded of record (Rec., p. 105):

"The Court declares the law to be that it is admitted in this case Mern G. Welker, the husband of Bessie G. Welker, received the injuries which resulted in his death at Shenandoah, in the State of Iowa; that, at the time of his death, the said Mern G. Welker was a citizen and resident of Shelby County, Missouri, and the plaintiff, Bessie G. Welker, administratrix of the estate of said Mern G. Welker, deceased, was, at the time of his death, and at the time of the commencement of this suit, a citizen and resident of said Shelby County, Missouri; that such being the ad-

mitted facts, this suit was improperly brought in Livingston County, Missouri, and that therefore the Circuit Court of Livingston County, Missouri, acquired no jurisdiction of the cause."

But the trial court refused to so declare the law and this ruling was sustained by the Kansas City Court of Appeals with the following statement (Rec., p. 11):

"It is insisted that by reason of General Order Nos. 18 and 18a, promulgated by the Director General of Railroads, providing that suits against carriers must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose, the Circuit Court of Livingston County has no jurisdiction, as the plaintiff resided in Shelby County, and the cause of action arose in Iowa. The venue of transitory causes of action provided by the laws of the state could not be modified or limited by orders of the Director General as was attempted in General Orders 18 and 18a."

General Orders Nos. 18 and 18a were before this Court in the case of *Alabama and Vicksburg Railway Company v. Journey*, supra, and the terms of these orders are set out in full as a footnote to the Court's opinion. By these orders of the Director General it was required that "all suits against the carriers, while under Federal control, must be brought in

the county or district where plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

As the cause of action set up in the petition filed by the administratrix in the Circuit Court of Livingston County, Missouri, concededly accrued at Shenandoah, Page County, Iowa, and as both plaintiff's decedent and the plaintiff, administratrix, resided in Shelby County, Missouri, the Circuit Court of Livingston County, Missouri, was without jurisdiction to hear and determine the issues raised in the suit, because of the violation of the requirements of General Orders Nos. 18 and 18a.

This point was fully considered and decided by this Court in the *Journey* case, *supra*, and under the rule announced in that decision the judgment against petitioner should be reversed.

### III.

The jurisdiction of the Circuit Court of Livingston County, Missouri, to hear and determine respondent's petition or motion filed in the main case necessarily depended upon the jurisdiction of said Circuit Court to hear and determine the said principal cause. Respondent was merely an intervener in that suit.

It will be observed that respondent, Miles Elliott, was an intervening petitioner in the suit then pending

in the Circuit Court of Livingston County, Missouri, brought by Bessie G. Welker, administratrix of the estate of Mern G. Welker, deceased v. Wabash Railway Company. We have shown that under the decisions of this Court in the Ault and Journey cases, *supra*, the Circuit Court of Livingston County, Missouri, had no jurisdiction to determine the issues raised in the main case; and as the Circuit Court of Livingston County, Missouri, had no jurisdiction to determine the main case, it necessarily was without jurisdiction to hear and determine the issues raised by Elliott's intervening motion or petition because of the well-established rule that the jurisdiction to determine issues raised by intervening petitions or motions depends upon the jurisdiction of the Court over the issues raised in the main case.

Krippendorf v. Hyde, 110 U. S. 276;

Rouse v. Letcher, 156 U. S. 50.

#### IV.

There was no cause of action against petitioner growing out of the death of Mern G. Welker caused by the alleged negligence of the Director General of Railroads, his agents or servants, while operating the railroad of the petitioner (*Missouri Pacific v. Ault*, 256 U. S. 554), and, therefore, respondent Miles Elliott could not have, or have enforced, an attorney's lien upon a cause of action which did not exist.

This Court decided in the Ault case, *supra*, that a railroad corporation is not liable, either at common law or under the Federal Control Act, upon a cause of action arising out of the operation of its railroad by the Government, through the Director General of Railroads. Therefore, no cause of action whatever existed against petitioner by reason of the death of Mern G. Welker, occasioned by the alleged negligence of the agents and servants of the Director General while operating petitioner's railroad. It is obvious, therefore, that there was nothing upon which Elliott's supposed lien could attach as against petitioner.

The record in this cause shows conclusively that petitioner denied all liability on the cause of action set up in Bessie G. Welker's petition. That petitioner herein made no settlement of any supposed cause of action against it arising out of the death of Mern G. Welker, but on the contrary, that the Director General, through his representative, compromised and settled with the administratrix of the estate of deceased the claim for damages arising out of the alleged wrongful death of plaintiff's decedent by the payment of the sum of \$4,162.85, which sum was paid out of Federal funds by bank check or draft drawn by a Federal treasurer of the Director General, and which bore the superscription: "United States Railroad Administration, W. G. McAdoo, Director General of Railroads." Moreover, upon such payment

by the Director General, the administratrix executed and delivered to the representative of the Director General a release of all claims and demands she had as such administratrix "by reason of injuries received by Mern G. Welker, brakeman on freight train extra 2155, running between Stanberry, Missouri, and Council Bluffs, Iowa, such injuries resulting in his death at Shenandoah, Iowa, on or about the 2nd day of April, 1918;" and therein further acknowledged the receipt "of W. G. McAdoo, Director General of Railroads, the sum of \$4,000.00 in full for the above agreement as recited" (Rec., p. 72).

The dissenting opinion of Presiding Judge Trimble of the Kansas City Court of Appeals in ruling on petitioner's motion for rehearing of the case in that court so concisely and clearly states the contentions of petitioner that we take the liberty of quoting therefrom the following excerpts, taken from pages 18 and 19 of the Record:

"The contract between the attorney and plaintiff (Bessie G. Welker, Admx.), and which gives rise to the lien under Section 691 (Revised Statutes of Missouri, 1919), was to enforce a cause of action against the Wabash Railway Company and the notice given and the suit that was brought by the attorney under that contract, was given to and was brought against the said Rail-

way Company, and not against the Director General. On November 16, 1918, the Director General settled with the plaintiff, paying her the sum of \$4,000.00 in full settlement of 'all claims and demands at common law or under the laws of any state or of the United States,' which she had arising out of the said wrongful death. There can be no question whatever but that the Director General paid the money and settled the case. The settlement and release, signed by plaintiff, says he did, and the draft for the \$4,000.00, received by plaintiff in settlement of her case, shows that the money was paid by him. The former recites that the release is made 'in consideration of the sum of four thousand dollars (\$4,000.00) to me in hand paid by W. G. McAdoo, Director General of Railroads, operating the Wabash Railroad,' etc.; the draft for the \$4,000.00 bore the superscription 'United States Railroad Administration, W. G. McAdoo, Director General of Railroads,' and was signed 'Wabash R. R., Federal Account, F. L. O'Leary, Federal Treasurer.'

"Now, as I view it, the fallacy in the opinion of the majority is in holding that, because the Railway Company used the settlement made by the Director General to get the suit against itself dismissed, therefore, the company is liable to plaintiff's attorney for his fee. I do not think that this follows by any means. The Railway Company was not liable and never has, even impliedly, admitted liability.

“It is true, one need not have actual and valid cause of action against a party in order for the plaintiff’s attorney in the event of settlement before judgment, to have a lien for his fee. All that is necessary is that there be in good faith a contention or reasonable dispute about the matter. In such case if the other party settles with the plaintiff, such other party thereby impliedly admits the validity of such claims, and by the settlement precludes the possibility of litigating the issue of liability, and hence could not be allowed to assert against the attorney that there was not, in law or in fact, any liability. But that is not this case. Here the party that was sued did not settle with or pay the plaintiff. That was done by a person who was not sued, but who was liable; and the company which was sued, but was not liable, merely used the settlement made by the Director General to effect the dismissal of the case against it. There was in this no implied admission of liability on the part of the Railway Company. The release executed by plaintiff in consideration of the money paid by the Director General, who was not sued, but who was liable, extinguished or satisfied plaintiff’s cause of action; and as there remained no live cause of action in her, the defendant Railway Company had the right to the benefit of that extinguishment by having the case dismissed as to it without making itself liable for or subject to, the lien of plaintiff’s attorney for his fee.”

It is, therefore, respectfully submitted that the judgment of the Kansas City Court of Appeals in this cause should be reversed.

Respectfully submitted,

FREDERICK D. McKENNEY,  
N. S. BROWN,

Counsel for Petitioner.

October 16, 1922.

JAN 16 1923

WM. P. STANSBURY

No. 148, 225

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**In the Supreme Court of the  
United States**

**October Term, 1922.**

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WABASH RAILWAY COMPANY, *Petitioner,*

VS.

MILES ELLIOTT, *Respondent.*

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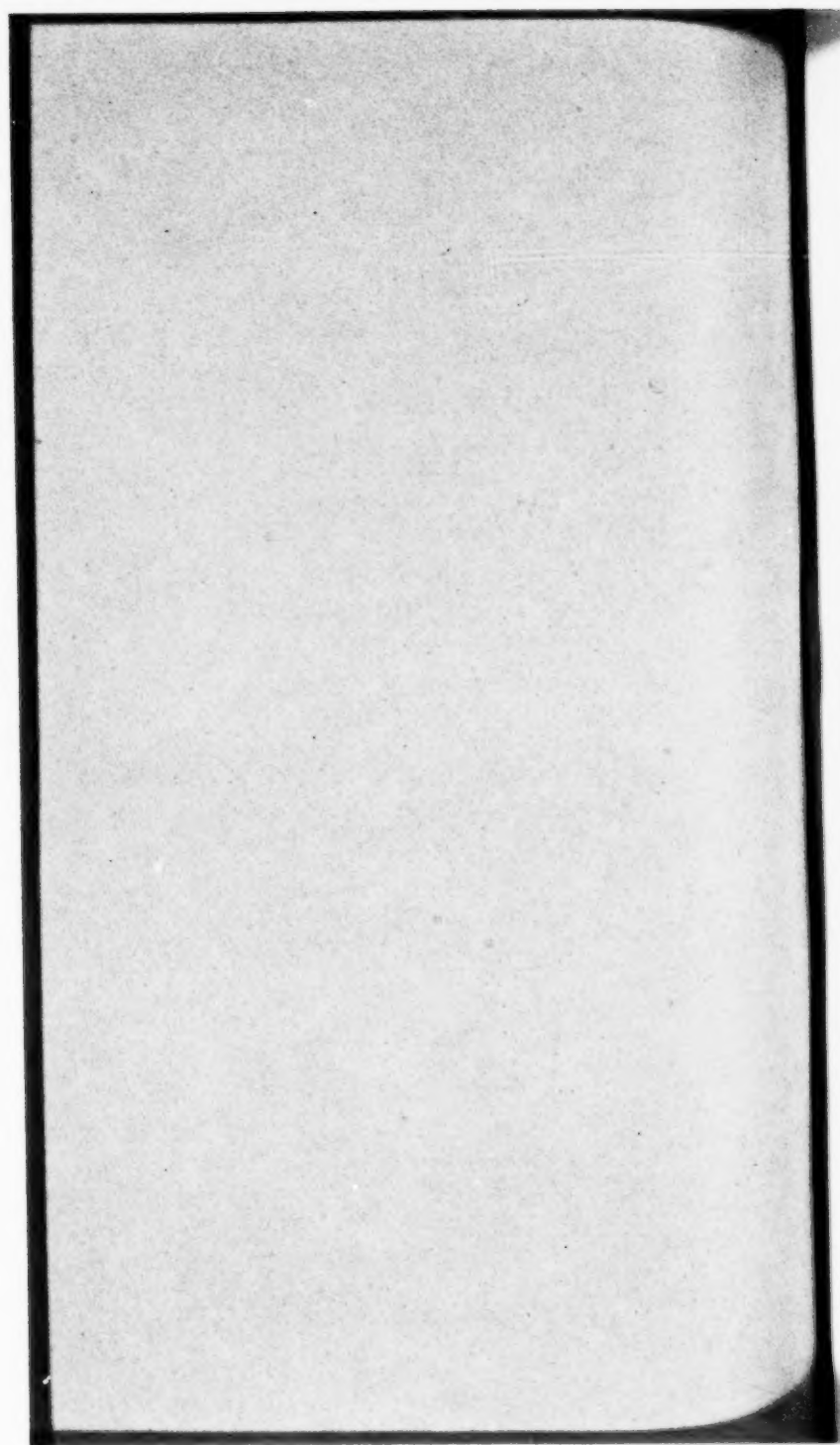
*On Writ of Certiorari to Kansas City Court of  
Appeals, State of Missouri.*

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**BRIEF FOR RESPONDENT.**

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GEORGE H. KELLY,  
WM. BUCHHOLZ,  
ISAAC B. KIMBRELL,  
MARTIN J. O'DONNELL,  
*Counsel for Respondent.*



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# In the Supreme Court of the United States

October Term, 1922.

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WABASH RAILWAY COMPANY, *Petitioner,*

VS.

MILES ELLIOTT, *Respondent.*

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*On Writ of Certiorari to Kansas City Court of  
Appeals, State of Missouri.*

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## BRIEF FOR RESPONDENT.

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No. 648.

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## STATEMENT.

On January 11, 1919, respondent filed in the Circuit Court of Livingston County, Missouri, the county in which he resided, an action against the Wabash Railway Company for the recovery of an attorney's fee or compensation, and afterwards,

on March 7, 1919, filed an amended petition in that action adding the Director General of Railroads as a defendant. This action was a suit for the amount of four thousand one hundred sixty-two dollars and eighty-five cents (\$4,162.85) due respondent under the attorney's lien statute of the state of Missouri (Sec. 691, R. S. Missouri 1919), which is as follows:

"Sec. 691. *Attorney May Contract for Percentage of Proceeds of Claim—Notice of Lien to Be Given to Defendant.* In all suits in equity and in all actions or proposed actions at law, whether arising *ex contractu* or *ex delicto*, it shall be lawful for an attorney at law, either before suit or action is brought or after suit or action is brought, to contract with his client for legal services rendered or to be rendered him for a certain portion or percentage of the proceeds of any settlement of his client's claim or cause of action, either before the institution of suit or action or at any stage after the institution of suit or action, and upon notice in writing by the attorney who has made such agreement with his client, served upon the defendant or defendants, or proposed defendant or defendants, that he has such an agreement with his client, stating therein the interest he has in such claim or cause of action, then said agreement shall operate from the date of the service of said notice as a lien upon the claim or cause of action and upon the proceeds of any settlement thereof for such attorney's portion, or percentage thereof, which the client may have against the defendant or defendants, or proposed defendant or defendants, and cannot be affected by any settlement between the

parties either before suit or action is brought or before or after judgment therein, and any defendant or defendants, or proposed defendant or defendants, who shall after notice, served as herein provided, in any manner, settle any claim, suit, cause of action or action at law with such attorney's client, before or after litigation instituted thereon, without first procuring the written consent of such attorney, shall be liable to such attorney for such attorney's lien as aforesaid upon the proceeds of such settlement, as per the contract existing as hereinabove provided between such attorney and his client."

While respondent did designate his action against the Wabash Railway Company a motion and filed it at the foot, so to speak, of the original suit of *Bessie G. Welker, Administratrix, plaintiff, v. Wabash Railway Company, defendant*, and did refer to himself as a movant and petitioner, nevertheless petitioner contended, and vigorously, that there was no authority under the attorney's lien statute of Missouri for a proceeding by motion to enforce an attorney's lien where the settlement complained of was made before judgment (as here) and cited a decision of the Supreme Court of Missouri in *Mills v. Met. St. Ry. Co.*, 221 S. W. 1, holding to that effect. The Kansas City Court of Appeals held, and rightly, that respondent's case was like the *Mills* case and that respondent's suit was an independent action and that while the designation of the action as a motion "might indicate that it was a proceeding in the original case, an understanding of all the

facts in the proceeding would indicate otherwise." (Rec., p. 6.)

Respondent's action resulting in the judgment here involved was in fact an independent action and the impression sought to be created by petitioner's statement that it was merely a motion or intervention in the original suit is at least misleading.

### **The Pleaded Issues.**

The pleading on which respondent tendered the issues was entitled "Amended Motion to Enforce Attorney's Lien." It was treated by the Missouri courts as a petition or complaint seeking a money judgment. In said pleading it was alleged that on the 17th day of May, 1918, Bessie Welker, personal representative of her deceased husband, entered into a contract with respondent as an attorney-at-law, "to investigate, settle, adjust, compromise or bring suit" upon a certain alleged cause of action against the petitioner. It was further agreed that respondent's compensation would be one-half of the amount recovered upon the claim, whether by suit, compromise, or settlement. (32.) It was further alleged that on the 23d day of May, 1918, respondent served a notice on the Wabash Railway Company advising it of respondent's contract and its terms (33); that notwithstanding such notice defendant, without the knowledge or consent of respondent, negotiated a settlement with Mrs. Welker by which petitioner agreed to pay and did pay to Mrs. Welker the sum

of \$4,162.85 and also agreed to pay a like amount to respondent as his attorney's fee (33-34); that petitioner entered into an agreement with plaintiff for the dismissal of her said action in fraud of respondent's rights and that petitioner fraudulently failed to put into its release the agreement that petitioner would pay respondent's attorney's fee (33).

### **Answer.**

In response to said motion, petitioner *voluntarily* filed its separate answer, generally and specifically denying the allegations of said motion (36-37). (The answer also urged two objections to the jurisdiction: (a) That Mr. McAdoo was operating the petitioner's railroad at the time Mrs. Welker's husband was killed; (b) That Mrs. Welker, *not respondent*, lived in Shelby County and that her husband also lived there at the time of his death.)

### **Reply.**

Respondent filed a reply which was a general denial (39).

### **Trial.**

Petitioner appeared at the trial at the January, 1920, term of the Circuit Court of Livingston County, Missouri, and the parties having waived

a jury, at the conclusion of the evidence the court rendered a judgment containing the recital:

"Now at this day this cause coming on for final hearing and determination by the court, the court having heretofore heard the evidence herein and being now fully and sufficiently advised in the premises *doth find the issues herein in favor of Miles Elliott \* \* \** against defendant Wabash Railway Company, in the sum of four thousand one hundred sixty-two dollars and eighty-five cents." (39.)

From this judgment petitioner prosecuted an appeal to the Kansas City Court of Appeals which court on May 23, 1921, finding no error of law in the record of the trial court, and having no jurisdiction to disturb its finding on the facts (*Mytton v. Ry.*, 211 S. W. 111; *Quisenberry v. Stewart*, 219 S. W. 625) in all things affirmed the judgment (R. 3).

Notwithstanding it knew that the Supreme Court of Missouri, under the peculiar practice of that state, had no jurisdiction on *certiorari* to review the record, petitioner, on July 27, 1921, filed its petition for *certiorari* in said court rather than this (R., p. 113), which petition was denied on October 29, 1921. It does not appear from the record when the petition for *certiorari* was filed in this court, but a copy of same served on respondent discloses that it was verified on December, 1921, *more than six months after the judgment of the Court of Appeals became final.* (*Ry. Co. v. Cliff*, 43 S. C. R. 126).

Notwithstanding the rule that "This court has repeatedly held that in cases coming to it from the Supreme Court of a State, it accepts as binding the findings upon issues of fact duly made in that court" (*Miedrich v. Laenschein*, 232 U. S. 236, L. c. 243), we shall briefly refer to the facts in evidence on which the judgment was founded as shown in the record before the Kansas City Court of Appeals.

Mern G. Welker was a brakeman in the employ of the Wabash Railway Company on the 2d day of April, 1918, and was killed by reason of its negligence at Shenandoah, Page County, Iowa, on said date. His widow was appointed administratrix of his estate by the Probate Court of Shelby County, Missouri. Thereafter she as such administratrix entered into a contract with the respondent Miles Elliott, by virtue of which he became her attorney as administratrix, and agreed to represent her as such in the prosecution of her claim for damages against the Wabash Railway Company on account of the death of her husband. The contract is shown on page 28 of the record. The contract was executed on May 17, 1918. By this contract it was agreed that respondent should receive fifty per cent of any and all amounts that might be recovered on account of the death of Merne G. Welker, whether recovered by suit, compromise, settlement or judgment.

On the 23d day of May, 1918, respondent caused the sheriff of Livingston County to serve a notice on the Wabash Railway Company of the

lien upon the cause of action created by such contract and its terms. Thereafter respondent prepared and filed a petition in the Circuit Court of Livingston County on June 5, 1918, praying for damages against the Wabash Railway Company, the then sole defendant. At the January term, 1919, the following stipulation was filed by *defendant's counsel acting for defendant* in said court and cause (8-9):

"In the Circuit Court of Livingston County,  
Missouri. To the . . . . Term, 1918.  
Bessie G. Welker, Administratrix of the Es-  
tate of Mern G. Welker, Deceased,

vs.

Wabash Railway Company.

The subject-matter of the above entitled suit having *been fully settled between the parties hereto*, it is hereby stipulated and agreed that said suit be dismissed at defendant's cost.

BESSIE G. WELKER,  
*Administratrix, Estate of Mern  
G. Welker, Deceased, Plaintiff.*

WABASH RAILWAY COMPANY,  
*Defendant.*

By C. G. WILLIAMSON,  
*Its Counsel."*

Three days thereafter the respondent filed a motion to enforce his attorney's lien. Thereafter, and at the same term, the respondent filed an amended motion to enforce attorney's lien. By this amended motion the Director General of Railroads was made a party defendant and sum-

mons issued, and on the same day the Wabash Railway Company filed its separate answer to the amended motion.

By this answer the Wabash Railway Company sought to contradict the return of the sheriff and claimed that the Director General was operating said railroad at the time of the injury. One paragraph of defendant's answer was characterized as in the nature of a plea in abatement to the jurisdiction of the court, specifically setting up that certain orders of the Director General deprived the court of jurisdiction, but not otherwise questioning the jurisdiction. It further denied that it made any settlement of the action, or that it had any knowledge of any contract between the plaintiff and the respondent, and added a general denial.

At the trial it was admitted that the appellant is a duly licensed and practicing attorney at law, and that the contract and paper marked Exhibit I herein contains the genuine signature of Bessie G. Welker and the genuine signature of Miles Elliott. It was also admitted that Bessie Welker was the duly appointed administratrix of the estate of Merne G. Welker. It was further agreed that respondent had no information or knowledge of the making of the settlement alleged in his motion until long after same had been made and until after payment had been made thereon, and that respondent did not give his consent to such settlement. There was no objection made, either in the answer or at the trial, to the court's proceeding on the motion, and no question raised as to the method of procedure. In fact, both parties and the

court proceeded throughout upon the theory that the method of procedure was correct and proper.

The petition and summons with the return thereof disclose that the petitioner Wabash Railway Company was duly summoned on the 10th day of June, 1918, and also the sheriff's return shows that petitioner was notified of respondent's contract on the 24th day of May, 1918. The sheriff's return as to the notice is as follows (R., p. 47):

"RETURN.

Served the above notice on the Wabash Railway Company in Livingston County, Missouri, on the 24th day of May, 1918, by leaving a true copy of the same at the business office of said railway company in Chillicothe, Missouri, with W. R. Stepp, the agent and person in charge of said office, and I hereby certify that the president or other chief officer of said railway company could not be found in my county.

JAMES J. BROWN, Sheriff."

The summons is as follows:

"ORIGINAL WRIT.

*State of Missouri, County of Livingston—ss.*

The State of Missouri to the Sheriff of Livingston County, Greetings:

We command you to summon Wabash Railway Company, a corporation, to be and appear in the Circuit Court of Livingston County, before the judge thereof, on the first day of the next term of court to be begun and held at the court house, in the city of Chillicothe, in Livingston County, on the first Monday in

September, at 8:30 a. m., 1918, it being the 2d day of September, A. D. 1918, to answer the petition of Bessie G. Welker, administratrix of the estate of Mern G. Welker, deceased, and have you then and there this writ, with the manner in which you executed the same.

*In Witness Whereof*, I, Byrd L. Hamblin, clerk of said court, hereunto set my hand and affix the seal of said court at my office in Chillicothe, this, the 5th day of June, A. D. 1918.

(Seal)

DREW P. TYE, *Clerk.*"

The sheriff's return is as follows (48):

"SHERIFF'S RETURN.

Served the within summons in Livingston County, Missouri, on the 10th day of June, 1918, by leaving a true copy of the within writ, with a copy of the petition thereto attached, as furnished by the circuit clerk of Livingston County, Missouri, with W. R. Stepp, agent of the Wabash Railway Company, the within named corporation, defendant, at the office of the defendant in Chillicothe, Livingston County, Missouri, the said W. R. Stepp being the agent and person in charge of the business office of the defendant in Chillicothe, Missouri, the president or other chief officer not being found in my county.

JAMES J. BROWN,

*Sheriff of Livingston County, Missouri.*

Fee \$1.00.

No. 22757.

Filed June 10, 1918.

DREW P. TYE, *Circuit Clerk.*"

The record of the court showing the filing of a stipulation for dismissal filed on January 6, 1919, in case of *Bessie G. Welker, Administratrix, Plaintiff, v. Wabash Railway Company, Defendant*, recites:

"Stipulation for dismissal filed by defendant through its counsel."

The stipulation itself so filed was introduced in evidence without objection. The stipulation recited that the subject matter of the above entitled suit having been fully settled *between the parties hereto, it is hereby stipulated and agreed that said suit be dismissed at defendant's costs.*

The plaintiff Bessie Welker Hampton (whose name was changed by marriage) gave her testimony by deposition in the cause and testified to retaining Mr. Elliott and entering into a contract with him for his fees. She further testified that she received four thousand dollars (\$4,000.00) from the defendant in settlement of the law suit through Mr. Williamson, whom she described as the claim agent of the Wabash Railway Company. Mr. Williamson told Mrs. Welker at the time he gave her the bank draft that the four thousand dollars (\$4,000.00) was hers and that he would pay the lawyers. He asked plaintiff about the terms of the contract and what part of the proceeds was to go to her lawyer. Mrs. Welker advised him that she had agreed with her lawyer to pay him fifty (50) per cent, and when plaintiff advised Mr. Williamson that the attorney was to get one-half, Mr. Williamson said he would pay

the attorney. He further advised her to put the draft in the bank and use the money as her own. He further told her that the money was her own; that he would pay the lawyers and that she should not divide up the money or anything like that. He further agreed to pay the funeral expenses, which amounted to \$162.85. She signed a release of her claim or cause of action at the time she received the four thousand dollars (\$4,000.00).

Her testimony in part follows:

"Q. You may state whether or not you ever received anything from the Wabash Railroad Company or anybody representing that road in settlement of your law suit? A. I received \$4,000.00.

Q. And from whom did you receive \$4,000.00? A. Mr. Williamson, claim agent.

Q. Do you know Mr. Williamson's initials? A. C. D.

By Mr. Jones: It is 'C. G.'

Q. Who is Mr. C. G. Williamson? A. Claim agent for the Wabash Railroad.

Q. Now, when he paid you, in what form was this payment made? A. Bank draft.

Q. And what did Mr. Williamson say at the time, if anything, concerning your attorney, Mr. Elliott? Did Mr. Williamson, the claim agent, say anything about Mr. Elliott's compensation to you? A. No. I don't understand what you mean, I suppose.

Q. What did you tell him about what part of the proceeds would go to your lawyers?  
A. I told him 50 per cent.

A. He said he would pay the lawyers, the attorneys.

Q. And what did he say about the amount that you received as to what should be done with it? A. Said I should put it in the bank and use it as my own.

Q. In your own language, state what it was that he said about that \$4,000.00 when he gave it to you, in your own way; that is, as to whether it was your lawyer's, your own, or whose it was. \* \* \* A. He said it was my own and that he would pay the lawyers; that I shouldn't divide it up or anything like that.

\* \* \* \* \*

Q. Mrs. Hampton, what, if anything, in addition to the \$4,000.00 did the claim agent agree to pay? A. He agreed to pay the funeral expenses.

Q. And did he? A. He did.

Q. How much were they? A. \$162.85.

Q. You may state whether or not you signed a release of your claim or cause of action at the time you were paid this \$4,000.00. I will withdraw that question. You may state whether or not you signed any papers. A. I did.

Q. And about how many? A. One.

Q. And do you know what that paper was?  
A. I don't.

Q. Would it refresh your recollection any if I would call your attention to the fact that it was a release or something of that nature?

A. What I supposed it to be.

Q. Did you read it? A. No, I didn't.

Q. You just signed whatever paper he gave you? A. Yes.

Q. Well, what did he represent it to be; what did he tell you it was? A. I suppose it was a release; I don't know what he told me it was. I don't believe he even told me."

For the purpose of showing notice to the defendant of the pendency of the suit of the administratrix, the deposition of Roy Floyd, taken on the 27th day of June, 1918, was introduced. The defendant appeared by Mr. Jones, its counsel, "for the sole and only purpose of objecting to the taking of depositions on the part of plaintiff in pursuance of the notice heretofore served upon defendant," for the reason that the Circuit Court of Livingston County, Missouri, had no jurisdiction over the defendant on the ground that plaintiff was a non-resident, having been appointed by the Probate Court of Shelby County, Missouri, and that the cause of action accrued in the state of Iowa. That is to say, the objection to the taking of depositions *conceded that the appellant had been served with notice* and that the *only objection* to the taking of depositions was based upon the orders of the Director General. The testimony of the witness Floyd disclosed that the administratrix had a meritorious cause of action and that both he and deceased were employed by the appellant The Wabash Railway Company at the time of the injury to deceased.

The defendant orally demurred to respondent's evidence and the demurrer was overruled. Ap-

pellant sought by the testimony of one W. R. Stepp to contradict the return of the sheriff. The court, referring to the decision of the Supreme Court in *Smoot v. Mudd*, 184 Mo. 508, declined the offer on the ground that in the absence of fraud the return of the sheriff was conclusive.

Exhibit 4 was introduced in evidence over the objection of respondent, in which it was recited that in consideration of the sum of four thousand dollars (\$4,000.00) paid to her the plaintiff agreed to release said Director General of Railroads and the *Wabash Railway Company* from all claims and demands at common law or under the laws of any state, or the United States, which she had against them by reason of injuries received by her husband on the date of his death.

Mr. Williamson testified that he was in the employ of the United States Railroad Administration from December 27, 1917, and claimed that he represented the United States Railroad Administration in effecting this settlement. He sought to explain why the stipulation was signed by the *Wabash Railway Company*, but did not succeed. His testimony contradicted that of Mrs. Welker. He admitted that the settlement was made after the suit was instituted and notice served on the petitioner, to-wit, on the 16th day of November, 1918. The stipulation was prepared by Mr. Brown, who was attorney both for the Director General and for the *Wabash Railway Company*. The stipulation was forwarded to Mr. Brown either by the appellant or by the railroad administration. Defendant introduced Orders

Nos. 18, 18a and 50, issued on April 9, 1918, April 18, 1918, and October 28, 1918, respectively, by the Director General of Railroads. At the conclusion of the evidence its counsel orally asked the court to declare that the finding and judgment should be against both the Wabash Railway Company and Director General, which was overruled.

Mr. Williamson was recalled by petitioner's counsel and sought to contradict the testimony given by plaintiff, but admitted that she told him that respondent was representing her. He claimed that he did not know there was any claim pending against the defendant, and the court thereupon interrupted and asked him what he meant by his testimony that the stipulation of dismissal was entitled as it was because the case was docketed under that name in the office of the United States Railroad Administration. He admitted that he was connected with the claim department of the Wabash Railway Company and the Director General from June until November, 1918. He admitted that he knew of respondent's contract concerning the suit long before the settlement was made when he first investigated the case just after the suit was filed. He admitted that the plaintiff asked him in the presence of Judge Maupin if she could use that money and admits that he did not tell her that she would be required to pay her counsel. The stipulation for the dismissal of the case was signed at the same time the agreement of settlement was signed and the check delivered.

## BRIEF OF THE LAW.

### I.

The jurisdiction of the Circuit Court of Livingston County, Missouri, over the independent action instituted by respondent by motion and asserted by respondent against petitioner in that court was not dependent upon whether or not the court had jurisdiction over the suit of Bessie G. Welker, Administratrix, against petitioner.

*Gilham v. Railway*, 282 Mo. 118.

*Mills v. Ry.*, 221 S. W. 1.

*Elliott v. Wabash Ry. Co.*, 208 Mo. App. 348.

### II.

Respondent's motion to enforce his lien alleged every fact essential for an independent cause of action. Petitioner *voluntarily* appeared and by the last four paragraphs of its separate answer to said motion (36-37) generally and specifically denied the allegations of the motion and to this answer respondent filed a reply which was a general denial (39). On the issues so joined the court sitting as a jury found the issues in favor of plaintiff and against the petitioner, after a trial in general conformity to the rules and usages governing the trial of civil actions at law and was due process of law, since the real purpose of the motion was not to revive a dead law suit, but to

establish a monetary judgment for the value of his lien and therefore respondent's independent action cannot be treated as a mere intervention by this court, since the Missouri Court did not so treat it.

*Gilham v. Ry.*, 282 Mo. 118.

*Elliott v. Wabash Ry. Co.*, 208 Mo. App. 348.

### III.

Respondent's action grew out of the act of petitioner in making a settlement of the suit of Bessie Welker against petitioner in fraud of the rights of respondent, and not out of any act of the Director General of Railroads, and for said reason respondent's rights were not affected by the provisions of General Order No. 50 of said Director General, as his rights against petitioner were well settled by a long course of decisions construing the Missouri Attorney's Lien Act.

Sec. 691 R. S. 1919.

*Mytton v. Ry.*, 211 S. W. 111.

*Mytton v. Ry.*, 198 S. W. 189.

*Boyd v. Company*, 135 Mo. App. 115.

*Kammerer v. Ry.*, 211 S. W. 687.

*Curtis v. Ry.*, 118 Mo. A. 341.

*Curtis v. Ry.*, 125 Mo. A. 369.

### IV.

This court will follow the decisions of the courts of the state construing the Attorney's Lien Act.

*Kuhn v. Fairmount Coal Co.*, 215 U. S. 349.

## V.

Respondent's cause of action against petitioner accrued when it made the settlement with the administratrix and the fact that later decisions of the court may have disclosed that the administratrix had no cause of action against petitioner, does not relieve it of liability to respondent for that portion of the proceeds of the settlement retained by it and which it contracted to pay to him.

Anson on Contract, pp. 75-77.

12 C. J., pp. 324, 326, 327.

*Livingston v. Dugan*, 20 Mo. 102.

*Wood v. Telephone Co.*, 223 Mo. 537.

*San Juan v. St. John's Gas Co.*, 195 U. S. 510.

*Fire Ins. Assn., Ltd. v. Wickham*, 141 U. S. 564.

*Hennessy v. Bacon*, 137 U. S. 78.

*Bofinger v. Tuyes*, 120 U. S. 198.

*Northern Liberty Market Co. v. Kelly*, 113 U. S. 199.

*Jeffries v. New York Mut. L. Ins. Co.*, 110 U. S. 305.

*St. Louis v. U. S.*, 92 U. S. 462.

*U. S. v. Child*, 12 Wall. 232.

*Union Bank v. Geary*, 5 Pet. 99.

12 C. J., pp. 329, 330.

## VI.

Petitioner, the administratrix and respondent in good faith believed that by virtue of the previous decisions of the Missouri and other courts construing the orders of the Director General of Railroads, that the action which petitioner settled was

a valid one and therefore under well settled principles it was not essential to respondent's right to recover that he should have proved that the action settled by defendant was valid in the sense that a recovery could be had thereon.

(Authorities *supra*.)

## VII.

The return of the sheriff showing service of the notice of respondent's lien on petitioner, as well as service of summons upon it, was conclusive upon the courts of the State, as it was not impossible that the person on whom service was had could have been in the employ of both petitioner and the Director General of Railroads.

*Miedrich v. Lauenstein*, 232 U. S. 236.

*Ticksburg S. & P. Ry. Co. et al. v. Anderson Tully Company*, 256 U. S. 408.

*Smoot v. Judd*, 184 Mo. 508.

*Walker v. Rollins*, 14 How. 584.

## VIII.

**The finding of the trial court, sitting as a jury, is conclusive upon the issue of facts as to whether petitioner made the settlement.**

*Mytton v. Ry.* 211 S. W. 111.

*Quisenberry v. Steward*, 219 S. W. 625.

*Webster v. Webster Estate*, 189 S. W. 608.

## IX.

In any event having accepted the benefits of the settlement by preparing and filing the stipulation to dismiss (R., p. 48) the petitioner could not be heard by the Missouri courts, nor by this court, to urge that it did not make the settlement.

*Wilson v. St. Joseph & Grand Island Ry. Co.*, 211 S. W. 897.

*Reed v. John Gill & Sons*, 201 Mo. App. 457, 459.

## X.

In order for respondent to recover it was not necessary that any suit or action whatever should have been pending between Bessie G. Welker, Administratrix, and the Wabash Railway Company, at the time the settlement was made. Whether notice of the attorney's contract has been served upon the opposing party, the rights of the attorney cannot be affected by any settlement, "either before or after suit is brought" and any defendant or "proposed defendant," who settles with the attorney's client after notice has been served is liable to the attorney for the attorney's lien upon the "proceeds of such settlement."

Revised Statutes Mo. 1919, Sec. 691.

## XI.

The dissenting opinion of Judge Trimble is based upon a misconception of the record. It states that the settlement was made by the Director General, notwithstanding the trial court found the issue on that question to the contrary and that this finding was conclusive upon Presiding Judge Trimble and the Kansas City Court of Appeals.

## ARGUMENT.

As it was not impossible that Mr. Stepp, the person upon whom the sheriff's service of the notice of respondent's lien and service of the summons in the suit by the administratrix against petitioner (*Vicksburg S. & P. Ry. Co. v. Anderson-Tully Co.*, 256 U. S. 408; *Anderson-Tully Co. v. Railway*, 261 Fed. 741; *Hite v. Ry. Co.*, 225 S. W. 916), the sheriff's return of service was conclusive on the Missouri courts and on the parties.

The question is foreclosed by the decision of the Supreme Court in *Smoot v. Judd*, 184 Mo. 508, and by a long line of Missouri decisions, holding that:

"Ever since the decision of this court in *Hallowell v. Page*, 24 Mo. 590, the law has been uniformly declared in this state to be that 'the return of a sheriff on process, regular on its face, and showing the fact and mode of service, is conclusive upon the parties to the suit. Its truth can be controverted only in a direct action against the sheriff for false return.'"

The court further specifically approved the decision of the Supreme Court in *Bank v. Seuman*, 79 Mo., l. c. 532, holding that parol evidence was inadmissible in aid or support of the return or against it.

The cases cited by appellant under its third point are applicable to different issues and circumstances from those before the court in this case, and hence they have no application.

In a well-reasoned decision by the United States Circuit Court of Appeals for the Fifth Circuit, in *Vicksburg, S. & P. Railway Co. v. Anderson Tully Co.*, 261 Fed. 741, the concrete question is settled. That suit was brought against a railway company while it was under federal control. The contention was made that this could not be done. Said the court:

"It is contended that the defendant, the Vicksburg, Shreveport & Pacific Railway Company, was not properly served. The return of the marshal is that the summons was:

'Executed by handing a true copy of this summons and petition for judgment to Austin King, freight agent for the V. S. & P. R. R. Co., Vicksburg, Miss., December 4, 1919.'

Plaintiff in error contends that the defendant railroad was then in government operation and control, of which the courts take judicial notice, and hence that the person served was an employee of the government and not an agent of the carrier. The return is to the effect that, at the time of service, the person to whom the copy was handed was an agent of the defendant railroad. The return, so long as its recital is unamended, is conclusive of the character of the person served. The fact that King was an employee of the government did not necessarily prevent his being also and at the same time an agent of the carrier, for the transaction of its business."

This court in *Vicksburg S. & P. Ry. Co., et al. v. Anderson Tully Company*, 256 U. S. 408, is in accord with the foregoing. It is there said:

"—the return of the marshal was properly accepted by both lower courts as conclusive. He may not have been in the employ of the Director General of Railroads at all and it *was entirely possible for him to have been serving as agent for both the director and the company.*"

and the sheriff's return would have been conclusive, even if it were false, since there was no fraud alleged or proven. (*Miedreich v. Launstin*, 232 U. S. 236). In that case it is said:

"In a case of this character the law must have in view not only the rights of the defendant who has been a victim of a false return on the part of the sheriff, but of persons who have relied upon the regularity of the return of officials necessarily trusted by law with the responsibility of advising the court as to the performance of such duties as are here involved."

But the fact that petitioner, by its counsel, appeared and filed a stipulation for dismissal, which recited that the subject matter of the cause had "been fully settled between *the parties* thereto" (R., p. 27), demonstrated that petitioner for the purpose of obtaining advantage of the settlement *judicially admitted* that it was not a moribund entity, but that it was fully alive and was sensitive to the effect of the many decisions of the state

and federal courts holding railway companies liable to persons under circumstances similar to those detailed in the petition of *Bessie Welker, Administratrix, v. Wabash Railway Co.* (R., pp. 24-26). Among those decisions was one by the Missouri court expressly holding the railway company liable to an employee for injuries sustained while he was working for the Director General of Railroads (*Hite v. Railway Co.*, 225 S. W. 916).

The original opinion of the Court of Appeals, as well as the opinion on the motion for rehearing, demonstrates that the liability of the petitioner corporation was not based upon any act or omission of the Director General, but was based upon its own act in entering its appearance and in filing a stipulation to dismiss a suit filed against it in good faith and upon a cause of action which the Supreme Court of Missouri and the courts of many other states, as well as the Federal courts, had held was valid, which stipulation recited that defendant corporation had settled same and was taking advantage of settlement made for its benefit, by dismissing the suit.

This is shown by the opinion wherein it is said:

"We find it unnecessary to go into the question as to whether a recovery can be had against the railway corporation for the acts of the Director General in view of the Federal Control Act and his order No. 50, as the facts in this case show that the administratrix had at least a *bona fide* dispute or doubtful claim against the railway company as such. This is shown by the fact that the courts themselves do not fully agree as to whether the

suit may not be successfully prosecuted against the railway company instead of the Director General of Railroads. There is no contention that the administratrix did not have a good cause of action from the standpoint of negligent conduct of one or the other, nor is there any question but that the claim was asserted in good faith. These facts, together with the further fact that a suit was pending at the time of the compromise, show that there was a sufficient consideration for the settlement. 12 C. J., pp. 324, 326, 327; *Livingston v. Dugan*, 20 Mo. 102; *Wood v. Telephone Co.*, 223 Mo. 537, 565, 123 S. W. 6. There was not only sufficient consideration for the settlement, but the amount of money under the agreement to settle was actually paid and received by the administratrix. In view of all of these facts it is not incumbent upon Elliott, in order to recover, to show that the claim was a valid one in the sense that claimant be able to recover on it. 12 C. J., pp. 329, 330. This renders it unnecessary for us to hold that the railway company is estopped to claim lack of consideration for the settlement by its conduct in accepting the fruits thereof after the amount of the settlement was paid the administratrix. From what we have said we think there is no question but that Elliott is entitled to recover."

On rehearing the Court of Appeals had before it the identical question presented to this court, and had before it all the authorities, together with the decision of the Supreme Court of Missouri in *Adams v. Railway Co.*, 229 S. W. 790, where the Supreme Court of that state holds that the railway company is not liable for the acts of those em-

ployed in the railroad service during Federal control. The Court of Appeals in the opinion herein recognized this as the law, and said on motion for rehearing:

"We were careful in the opinion to say, 'We find it unnecessary to go into the question as to whether a recovery can be had against the railway corporation for the acts of the Director General,' and placed our decision on the proposition that it was not necessary that there could be such a recovery, but, as Mrs. Welker had a *bona fide* doubtful claim against the railway corporation, and that corporation settled it with her while the suit was pending against it, there was a sufficient consideration for the settlement and the settlement was paid, and that, consequently, it was unnecessary for Elliott to show his client's claim was a valid one in the sense that the claimant be able to recover on it.

The fact that the claim was at least a doubtful one when the settlement was made is shown by the cases of *Hite v. Ry.*, *supra*; *Postal Telegraph Co. v. Call*, 255 Fed. 850, 167 C. C. A. 178; *Jensen v. L. F. R. Co.* (D. C.), 255 Fed. 795; *Johnson v. McAdoo* (D. C.), 257 Fed. 757; *Witherspoon v. Postal, etc., Co.* (D. C.), 257 Fed. 758; *The Catawissa* (D. C.), 257 Fed. 863; *Dampskibs v. Hustis* (D. C.), 257 Fed. 862; *Lazalle v. N. P. R. Co.*, 143 Minn. 74, 172 N. W. 918, 4 A. L. R. 1659; *Gowan v. McAdoo*, 143 Minn. 227, 173 N. W. 440; *Paylo v. N. P. R. Co.*, 144 Minn. 398, 175 N. W. 687; *Ringquist v. M. & N. R. Co.*, 145 Minn. 147, 176 N. W. 344; *McGregor v. G. N. R. Co.*, 42 N. D. 269, 172 N. W. 841, 4 A. L. R. 1635; *Franke v. C. & N. W. R. Co.*, 170 Wis. 71, 173 N. W.

701; *M. P. R. Co. v. Ault*, 140 Ark. 572, 216 S. W.3; *Lancaster v. Keebler* (Tex. Civ. App.), 217 S. W. 1117; *Clapp v. Amer. Ex. Co.*, 234 Mass. 174, 125 N. E. 162; *Owens v. Hines*, 78 N. C. 325, 100 S. E. 617."

The principle which the Court of Appeals applied in holding the defendant liable was merely in accordance with the common law rule outlined by Anson in his ancient work on Contracts, pages 75 to 77:

"Compromise of Suits.—The commonest form in which a forbearance appears as consideration for a promise is in the compromise of an action. A, the plaintiff, promises X, the defendant, that in consideration of certain things to be done by X he will forbear to prosecute his suit; and this is good consideration for the act or promise of X. But here, in order to make the forbearance a consideration, the plaintiff must believe in his case. In *Wade v. Simeon* it was held that forbearance to proceed in an action knowingly brought without cause is no consideration for a promise.

Plaintiff must believe in his case. Therefore the plaintiff must believe that he has a case, and must intend *bona fide* to maintain it by action. If he does so, the fact that he has in truth no cause of action, and that the defendant knows that he has none, will not invalidate a compromise, whether made before or after the commencement of litigation. Where a man was threatened with legal proceedings because the plaintiff believed that he was liable, and he, though he knew that he

was not liable, gave promissory notes to avoid being sued, was held to be bound by his promise. The plaintiff had abandoned a claim which he believed to be enforceable, and meant to try and enforce; the defendant escaped the inconvenience and anxieties of litigation, and the compromise was deemed to be a sufficient consideration for the notes. In a later case the law upon the subject is thus stated by Cockburn, C. J.: 'If a man *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to do so will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and instead of being annoyed with an action he escapes from the vexations incident to it. It would be another matter if a person made a claim which he knew to be unfounded, and by a compromise obtained an advantage under it. In that case his conduct would be fraudulent.' "

The act of the petitioner in judicially admitting that it had settled the suit of the administratrix was a judicial admission binding on the trial court. Even had the petitioner not made the settlement, but had it been made by the Director General, yet under the Missouri decisions construing the Attorney's Lien Act, a pure question of local law, its adoption of the settlement by preparing and filing a stipulation for dismissal required the trial court to find petitioner liable to respondent. The record entry of the Circuit Court

for Livingston County showing that the petitioner filed the stipulation for dismissal is as follows:

"First Day, January Term, Monday, Jan. 6,  
1919.

No. 22737.

Bessie G. Welker, Admrx., Plaintiff,

vs.

Wabash Ry. Co., Defendant.

Stipulation for dismissal filed by defendant, through its counsel." (R., p. 27.)

The Missouri Appellate Court had theretofore held that the act of a railway company in accepting the benefit of a settlement made without its knowledge by drawing up and filing a stipulation dismissing the cause rendered it liable under the Attorney's Lien Act.

In *Wilson v. Railway Co.*, 211 S. W. 897, the defendant notified the New York Central Railroad Company of the suit, that it would be held liable if a judgment was rendered. The New York Central Railroad settled the suit without the knowledge of the defendant. The defendant sought to escape, as the appellant here seeks to escape, by asserting that it did not make the settlement, but this court said:

"After defendant was notified that the claim had been settled at the request of plaintiff, it drew up a stipulation to the effect that this suit should be dismissed, which was signed by plaintiff and filed for plaintiff by this defendant.

It seems plain to us that, if the New York Central was not acting as defendant's agent

from the very time that the question of adjustment was first broached, defendant certainly ratified the act of the New York Central in settling the case; this because defendant consented to the settlement by drawing up and filing the stipulation dismissing the cause as a result of the settlement. Defendant was the initial carrier, and was liable to plaintiff if his claim was good, and the settlement that was made was for its benefit as well as that of the New York Central, and when defendant accepted the settlement and the benefits accruing thereunder it ratified the act of the New York Central in making the settlement. This state of facts was properly proved under movant's motion alleging that defendant settled the case."

The decision of the Circuit Court of Livingston County and of the Kansas City Court of Appeals is therefore a decision in accordance with the long line of decisions construing the Missouri Attorney's Lien Act, and which was purely a question of local law and therefore the question presented is not properly reviewable by this court.

Furthermore, the opinion of the Court of Appeals might be further justified by an examination of Section 691, R. S. Mo. 1919, which provides that the attorney after notice served has a lien on the *proceeds of the settlement*. Under the decisions of the Missouri courts, the petitioner in settling the case and agreeing to pay the respondent's attorney fee was a settlement of the case for twice the amount paid by it to the administratrix

and therefore one-half of the proceeds of the settlement remained in the hands of the petitioner, to which respondent's lien attached. That was the issue presented to the trial court, and its decision on this question of fact was conclusive on the Court of Appeals (*Mytton v. Ry.*, 211 S. W. 111) and upon this court. The foregoing facts do not present any question of Federal law.

The liability fastened upon petitioner was that arising out of its own act in settling a case and retaining one-half of the proceeds of the settlement in violation of the Missouri Attorney's Lien Act and said liability did not arise out of any act of the Director General and therefore none of the orders of the Director General could affect the right of the respondent to recover against the defendant.

Though unnecessary to support the judgment in favor of respondent, the Circuit Court of Livingston County, Missouri, had jurisdiction of the defendant in the case of *Welker, Administratrix, plaintiff v. Wabash Railway Company*, defendant, in which the settlement or compromise was made. There is nothing in the Federal Control Act, or any order issued thereunder to even suggest that the carrier companies passed completely out of existence, or lost their corporate entities. The return of the sheriff conclusively shows that the Wabash Railway Company was duly served with process in Livingston County, Missouri. This gave the court jurisdiction of that company. Even though orders No. 18 and 18-a of the Director General of Railroads did deprive Bessie G. Wel-

ker, Administratrix, of her right to prosecute her action in the Circuit Court of Livingston County, Missouri. That was a matter to be raised by demurrer or plead in bar of her action and did not deprive the court of jurisdiction over the defendant.

## II.

In conclusion we reiterate that three well defined reasons stand in the way of review by this court:

- I. Absence of a federal question.
- II. The decision of the Kansas City Court of Appeals rests on an independent principle of non-federal law.
- III. Clear and palpable error on the part of the state court does not appear.

## I.

It is essential to the jurisdiction of this court that it shall appear that a federal question is involved; that it was raised in and presented to the state court and that the decision was against the right claimed; that the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case; or that there has been no decision by the state court of any other matter or issue sufficient

to maintain the judgment of that court without regard to the federal question.

*Murdock v. Memphis*, 20 Wall. 590-642.

The existence of jurisdiction to review under these principles depends not merely upon form, but upon substance.

*Seaboard Air Line v. Padgett*, 236 U. S. 671.

To express it more clearly we quote from *Western Union Teleg. Co. v. Wilson*, 213 U. S. 52, on page 53:

"This case comes here from a state court, and, of course, therefore it must appear that a federal question necessarily was involved in the decision before this court can take jurisdiction or undertake to reverse the judgment of a tribunal over which it has no general power. It is not enough that a right under the Constitution of the United States was specially set up and claimed. It must be made manifest either that the right was denied in fact, or that the judgment could not have been rendered without denying it. *De-Saussure v. Gaillard*, 127 U. S. 216; *Johnson v. Risk*, 137 U. S. 300; *Leathe v. Thomas*, 207 U. S. 93, 99; see also *Batchel v. Wilson*, 204 U. S. 36."

## II.

The decision of the Kansas City Court of Appeals is based upon an independent principle of general law which eliminates liability upon the part of the defendant for the acts of the Director General of Railroads, thus excluding a federal question. Therefore, the consideration of a federal question was not necessary to the court's decision.

Petitioner does not gainsay this proposition, but claims that the Kansas City Court of Appeals missed the point at issue. We think that it hit the point at issue, but it makes no difference whether it did or not. Its decision in the case was a decision on a non-federal question and this court will not review it. That is to say, its decision was upon the question: When a suit is pending, and is asserted in good faith, in a court of general jurisdiction, against a defendant who appears in that court, and that defendant makes a settlement of the claim and pays one-half thereof and files a stipulation to dismiss the suit, does the settlement of the claim and the stipulation to dismiss make it liable under the general principles of law under Section 691, R. S. Mo. 1919, to respondent for the other half? Certainly, this is not a federal question. As was said in the case of *Murdock v. Memphis*, 20 Wall. 642, l. c. 638:

"The claim of right here set up is one to be determined by the general principles of equity jurisprudence, and is unaffected by anything found in the Constitution, laws, or treaties of

the United States. *Whether decided well or otherwise by the State Court, we have no authority to inquire."*

The Kansas City Court of Appeals had the right to apply the general principles of law enunciated by the Supreme Court of the state in *Livingston v. Dugan*, 20 Mo. 102; *Wood v. Telephone Co.*, 223 Mo. 537; 12 C. J. 324, 326, 327.

This court, in the following cases, has expressly recognized the application of the principle that the settlement of a *bona fide* dispute or doubtful claim is binding upon the parties and the courts, and that when a trial court refuses to give effect to such settlement, as did the Kansas City Court of Appeals give effect herein, it fails to give effect to a controlling principle of general law.

*San Juan v. St. John's Gas Co.*, 195 U. S. 510.

*Fire Ins. Assn., Ltd., v. Wickham*, 141 U. S. 564.

*Hennessy v. Bacon*, 137 U. S. 78.

*Bofinger v. Tuyes*, 120 U. S. 198.

*Northern Liberty Market Co. v. Kelly*, 113 U. S. 199.

*Jeffries v. New York Mut. L. Ins. Co.*, 110 U. S. 305.

*St. Louis v. U. S.*, 92 U. S. 462.

*U. S. v. Child*, 12 Wall. 232.

*Union Bank v. Geary*, 5 Pet. 99.

Though on a general principle of non-federal law, we would add that the dissenting opinion of Judge Trimble, of the Kansas City Court of Appeals, which petitioner quotes at length, utterly

ignores the fact that upon the disputed issue as to who made the settlement, the trial court, sitting as a jury, *found that the settlement was in fact made by defendant Wabash Railway Company.* There is no principle more firmly established by the courts of Missouri than that the finding of the trial court on disputed questions of fact is binding on, and cannot be disturbed by, the appellate courts. Cases without number so holding could be cited, but we will content ourselves with the citation of only a few of the recent authorities:

*Quisenberry v. Stewart*, 219 S. W. 625.

*Webster v. Webster's Estate*, 189 S. W. 608.

*Shelton v. Railway*, 190 S. W. 46.

*Russell Grain Co. v. Bainter*, 223 S. W. 769.

To show that the trial court had before it substantial evidence on which to base its finding, approved by the Missouri appellate courts, that defendant Wabash Railway Company made the settlement, we have only to quote the stipulation signed and filed by such defendant (see Petitioner's Record, p. 27):

"In the Circuit Court of Livingston County, Missouri. To the . . . . . Term, 1918.

Bessie G. Welker, Administratrix,

Estate of Mern G. Welker, deceased,

vs.

Wabash Railway Company.

The subject matter of the above entitled suit having been fully settled between the parties hereto, it is hereby stipulated and

agreed that said suit be dismissed at defendant's cost.

(Signed) BESSIE G. WELKER,  
 Administratrix, etc., Plaintiff.  
 WABASH RAILWAY COMPANY,  
 Defendant.  
 By C. G. WILLIAMSON,  
*Its Counsel.*"

Bearing in mind that at the time this stipulation was signed and filed by the Wabash Railway Company, it and the plaintiff administratrix were the only parties to the suit, the recitation of the "*suit having been fully settled between the parties hereto*" is and can be nothing but the written, signed statement of the Wabash Railway Company that it had made the settlement. Men have been convicted of grave crimes on statements far less solemn.

It is immaterial that the decision of this court in *Mo. Pac. R. R. Co. v. Ault*, or the decision of the Supreme Court of Missouri in the Adams case rendered long after the settlement was made, shows the rights of the parties to have been different from what they at the time supposed. *Hennessey v. Bacon*, 137 U. S. 78; *Mills County v. Burlington Ry. Co.*, 107 U. S. 557. In other words, it is not necessary to sustain a compromise of a doubtful right that the parties shall have settled the controversy as the law would have done. It is sufficient to support a compromise that there be an actual controversy between the parties of which the issue fairly may be considered by both parties as doubtful and that at the time of

the compromise they, in good faith, so considered it. *Kiefer Oil Co. v. McDougal*, 229 Fed. 933; *Long v. Towel*, 42 Mo. 545.

To sustain the contention of the petitioner, this court would find it necessary to overturn the well established principles of general law recognized by this court and the Supreme Court of Missouri and applied by the Kansas City Court of Appeals. For the reasons given the writ should be denied.

GEORGE H. KELLY,

WM. BUCHHOLZ,

I. B. KIMBRELL,

MARTIN J. O'DONNELL,

*Counsel for Respondent.*

JAN 10 1921

WM. R. STANLEY

No. **648 225**

In the Supreme Court of the  
United States

October Term, A. D. 1921.

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WABASH RAILWAY COMPANY, *Petitioner,*

VS.

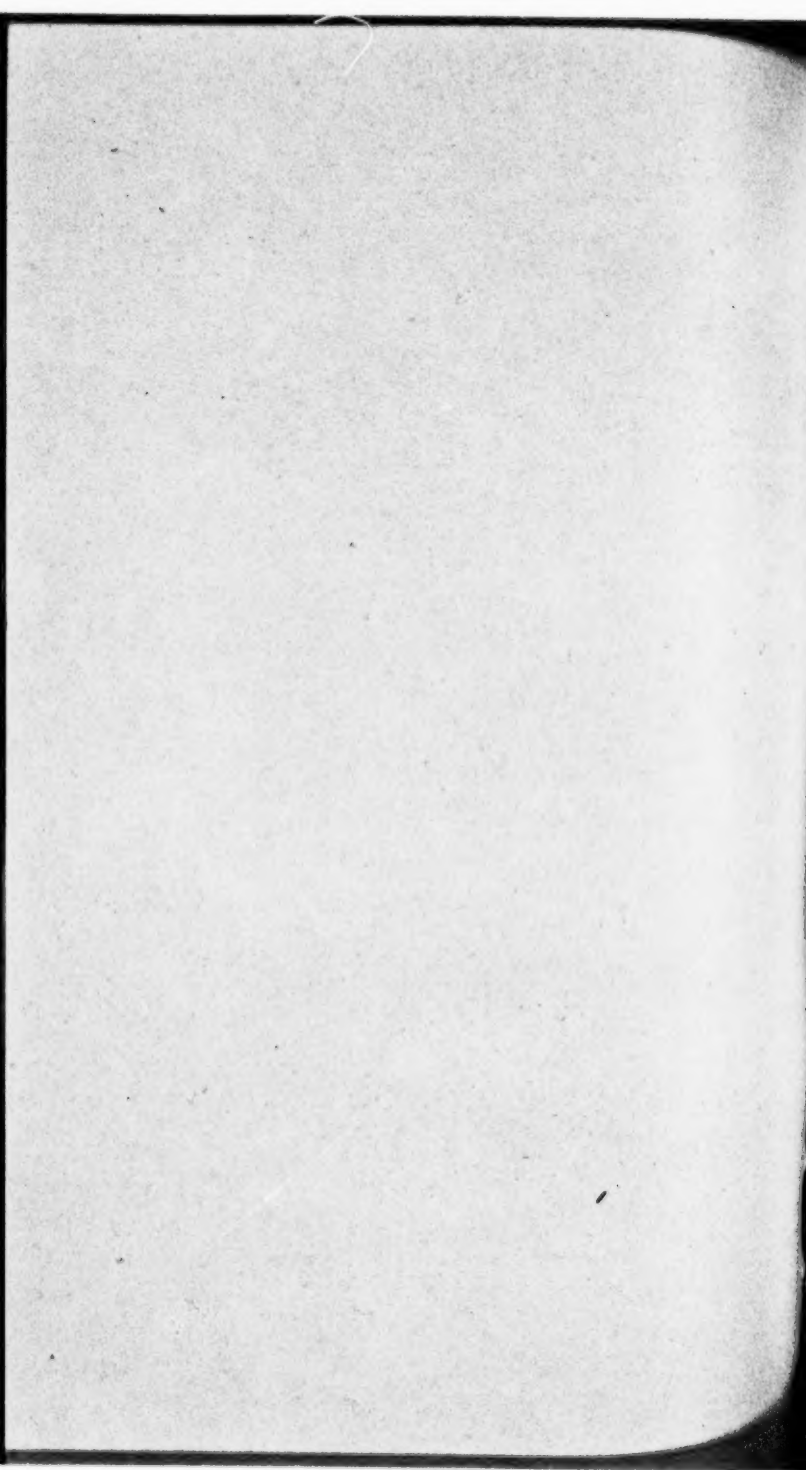
MILES ELLIOTT, *Respondent.*

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BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI.

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GEORGE H. KELLY,  
WM. BUCHHOLZ,  
I. B. KIMBRELL,  
MARTIN J. O'DONNELL,  
*Counsel for Respondent.*



# In the Supreme Court of the United States

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WABASH RAILWAY COMPANY, *Petitioner,*

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MILES ELLIOTT, *Respondent.*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No. —

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### STATEMENT OF CASE.

*To the Honorable, The Supreme Court of the  
United States:*

The facts out of which the present controversy arose are well stated in the opinion of the Kansas City Court of Appeals, which petitioner has

omitted from its petition. Those facts as thus stated are as follows:

"This is a suit under the Attorney's Lien Act. The facts show that on April 2, 1918, while the defendant Railway Company was in the charge of the Federal Government, and was being operated by the Director General of Railroads, Mern G. Welker, while employed as a brakeman upon the railroad, was killed at Shenandoah, Iowa. At the time of his death he was a resident of Shelby County, Missouri. Letters of administration on his estate were granted to his wife, Bessie G. Welker, by the Probate Court of Shelby County. On May 17, 1918, said Bessie G. Welker, as administratrix, entered into a contract with Miles Elliott of Chillicothe, Missouri, an attorney at law, who in the printed record is designated as movent, employing said Elliott as her attorney to represent her to 'investigate, settle, adjust, compromise, or bring suit upon her claim against the Wabash Railway Company on account of the death of her said husband,' and agreeing to pay him '50 per cent of all money received upon the above claim or cause of action, whether by suit, compromise or settlement.' After the execution of said contract Mr. Elliott drew up a written notice of his attorney's lien and placed it in the hands of the sheriff of Livingston County for service. It was addressed to the Wabash Railway Company, a corporation, reciting the substance of his contract with Mrs. Welker. This notice was dated May 23, 1918, and was served by the sheriff on the 24th day of May, 1918, his return reciting that he left a copy of the notice at the business office of the railway

company with W. R. Stepp, the agent and person in charge of said office, etc.

On June 5, 1918, Elliott filed suit in the Circuit Court of Livingston County to recover damages on account of the death of said Mern G. Welker, in which suit Bessie G. Welker, administratrix of the estate of Mern G. Welker, deceased, was plaintiff, and the Wabash Railway Company, a corporation, was defendant. At the January term, 1919, in the Circuit Court of Livingston County, a stipulation was filed in said cause for the dismissal of the same, signed by plaintiff and the Wabash Railway Company by C. G. Williamson, its counsel, and reciting that the subject matter of the cause had been fully settled, and stipulating that the suit should be dismissed at defendant's costs.

A few days after the filing of this stipulation, and before suit was dismissed, Elliott filed in the cause a motion entitled 'motion to enforce attorney's lien.' At the April term of said court, said Elliott, upon leave of court, filed an 'amended motion to enforce attorney's lien,' making Walker D. Hines, Director General of Railroads, as well as the Wabash Railway Company, defendant. The amended motion alleged that at all the times mentioned in said motion the 'Wabash Railway Company and its railway was to some extent and degree under the administration and control of the United States Railway Administration and of the United States Director General of Railroads,' under the 'Federal Control Act,' and proclamations of the President (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§3115¾a-3115¾p); that under General Order No. 50 the Director General of Railroads ordered

that he be made a party to all suits against railroads, and 'that the action herein is such a suit'; that Mern G. Welker was the employee of both defendants, and was killed by their negligence. Said motion further recited the granting of letters of administration to Bessie G. Welker, the contract between the latter and Elliott, the notice served upon the Wabash Railway Company, and that the agent upon whom such notice was served was agent of the Director General of Railroads, as well as of the Wabash Railway Company. It further alleged that defendants, with full knowledge of the terms and provisions of said contract, and without the knowledge or consent of Elliott, made a settlement with said administratrix, and in pursuance thereof paid her the sum of \$4,000.00, together with \$162.85 for funeral and burial expenses of the deceased; that 'your movent and petitioner has a lien upon the cause of action in the said cause in the amount of \$4,162.85, and that to permit the dismissal of this cause under said alleged agreement for dismissal, and to enter judgment of dismissal thereunder, would wrongfully and illegally de-force movent and petitioner of his said lien'; and prayed judgment in said sum mentioned.

The separate answer of the railway company is: First, a plea in abatement and to the jurisdiction of the court over said defendant, alleging that at the time of the death of the deceased said railway company did not operate, control, or manage, and was not in possession of the property, railroad rights, and franchises of the Wabash Railway Company, and that such were in the possession of the Federal Government under the control, management and operation of

the Director General of Railroads; that defendant did not have or maintain an office or place of business in Chillicothe, Livingston County, Missouri, in charge of an agent upon whom process could be served; that the process served in the cause was not served upon an agent of said defendant. It further alleged that the court had no jurisdiction over the cause, for the reason that, under the orders of the Director General of Railroads, suits or causes of action of this character should be brought at the place where the cause of action accrued, or where the plaintiff resided; that under General Order No. 50 of the Director General of Railroads the suit should have been brought against the Director General of Railroads, and not against the Wabash Railway Company, and 'that process was issued against this defendant in violation of said order.' The answer also contains a plea to the merits, denying that any person authorized to represent it had made a settlement with the administratrix, and that it had paid any money in any such sum. It further denied that it had any notice or knowledge of any contract existing between plaintiff and Elliott, or that such notice was served on any agent or employee of the defendant.

The separate answer of the Director General of Railroads, Walker D. Hines, is first a plea in abatement and to the jurisdiction of the court, alleging that at all times mentioned in the petition of the administratrix and in the motion of Elliott, the property, rights and franchises of the Wabash Railway Company were in the sole possession and under the control of the Federal Government and not under the control, operation and management

of the Wabash Railway Company; that under General Order No. 50 of the Director General of Railroads said Director General was in sole possession, management and control of the property of the defendant Wabash Railway Company; that process was issued against the Wabash Railway Company as sole defendant in the original cause of said administratrix against said company; that the return of said process in said cause shows that the only defendant attempted to be served was the Wabash Railway Company; that no process whatever was ever issued against Hines, Director General of Railroads, or his predecessor in office; that suit was not brought where the cause of action arose nor at the residence of plaintiff, contrary to the orders promulgated by authority of law. Said answer by way of a plea to the merits denies that any process was ever issued or served against the Director General of Railroads, or that he had any knowledge of any contract existing between Elliott and the administratrix. The answer further contained a general denial. The reply was a general denial. There was a trial before the court, resulting in a judgment in favor of Elliott and against the Wabash Railway Company in the sum of \$4,162.85 and costs, and in favor of the Director General of Railroads. Defendant Wabash Railway Company has appealed."

The opinion of the Court of Appeals applying the law to those facts is as follows:

"(1) Appellant contends that there is no authority under the Attorney's Lien Statute (Sections 690, 691, R. S. 1919) for a pro-

ceeding to enforce an attorney's lien by motion in the original cause where the settlement complained of is made before judgment, citing, among other cases, the case of *Mills v. Mcl.*, 282 Mo. 118, 221 S. W. 1. Respondent admits that, if this suit were based on Section 690 of the Attorney's Lien Statute, the contention would be well taken, but contends that he has a right to proceed by motion in the original cause where the proceeding is based on Section 691. We do not find it necessary to pass upon these contentions, for the reason that the situation in this case appears to be the same as that in the *Mills* case. While the record designates this proceeding as a motion to enforce attorney's lien, and the motion is filed in the cause of Bessie G. Welker, as administratrix of the estate of Mern G. Welker, deceased, against the Wabash Railway Company, and while such designation might indicate that it was a proceeding in the original case, an understanding of all the facts in the proceeding would indicate otherwise. The first pleading in the present proceeding alleges every fact necessary to a statement of an independent cause of action against the defendant Wabash Railway Company in an action at law for the enforcement of Elliott's lien, and prays judgment against said defendant for the amount thereof. Appellant makes no point that it was not served in this proceeding as in an ordinary action, nor did it object in the lower court to the form of the proceeding, but assumed that it was regular in this respect, and filed its plea in abatement and to the merits. To this answer Elliott filed a reply, consisting of a general denial. A trial was had upon the issues thus joined, and evidence was

received on behalf of all the parties; declarations of law and findings of fact were requested by such parties, and the case was submitted to the court, and judgment rendered, all in conformity with the rules and practices observed in civil actions in this state. The case was tried upon the theory that this proceeding was regular. The judgment rendered was a money judgment against the defendant, and nothing more. As before stated, the facts in reference to this matter were not essentially different from those that appeared in the Mills case, and under the holding in that case defendant's point is not well taken.

Whether Elliott could by his amended motion make the Director General of Railroads a party defendant jointly with the Wabash Railway Company is a question that is not before us for decision. There was no question raised in the trial court as to an improper joinder of parties defendant, and the Director General of Railroads has not appealed.

It is contended that the Circuit Court of Livingston County had no jurisdiction over the Wabash Railway Company in this case under the provisions of the Act of March 31, 1918 (Sections 311534a-311534p, U. S. Comp. St. 1918, Comp. St. Ann. Supp. 1919). In this connection it is insisted that, in view of the fact that the Wabash Railway Company was in charge of and under the control of the Federal Government, and being operated through the Director General of Railroads, the deceased was an employee of the Director General of Railroads, and was not in the employ of the defendant railway company; and in view of the fact that General Order No. 50 of the Director General of Railroads, providing that suits of this nature should be brought

against the Director General, and not otherwise, that the original suit herein was not only improperly brought against the Wabash Railway Company, but could not be maintained against the same, nor could Elliott's suit to recover his attorney's fees, and that it follows that the service of the notice of Elliott's contract on Stepp, station agent of the Wabash Railway Company, was not notice to the Wabash Railway Company, Stepp being an employee of the Director General, and not of the Wabash Railway Company, and that service of the original summons in the suit of the administratrix upon Stepp was void, and did not confer any jurisdiction upon the court over the defendant. Pertinent parts of General Order No. 50, promulgated October 28, 1918, read as follows:

'Whereas, since the Director General assumed control of said systems of transportation suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporations:

'It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage of property, arising since December 31, 1917, and growing out of the possession, use, control or opera-

tion of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.'

(2) The summons in the original cause was executed by the sheriff, and in his return he recites that he executed the summons by leaving a copy of the writ and a copy of the petition thereto attached with W. R. Stepp, agent of the defendant, Wabash Railway Company, at the office of the defendant in Chillicothe, Livingston County, Mo.; said Stepp being the agent and person in charge of the business office of the defendant in Chillicothe, the president or other chief officer not being found in the county. Even though the return of the sheriff showing service of summons on the defendant was false, it is conclusive upon the parties to the suit and their privies, and can only be controverted in a direct attack upon it in an action against the sheriff for false return. *Smoot v. Judd*, 184 Mo. 508, 518, 83 S. W. 481; *Vicksburg, S. & P. Rd. Co. v. Anderson-Tully Co.* (C. C. A.), 261 Fed. 741, 744. There is nothing in the act of Congress or the orders of the Director General of Railroads to indicate that the Wabash Railway Company, as a corporation, was not in existence, or that its entity as a corporation was suspended, even after its business and the operation of its railroad was taken over by the Federal Government (*Hines v. Dahn* [C. C. A.], 267

Fed. 105, 109, 110), and it is not impossible that said corporation might have had an agent in Chillicothe upon whom summons could have been served or might have maintained in its employ the usual officers and attorneys (*Hite v. St. Joseph & G. I. Ry. Co.*, 225 S. W. 916, 920; *Vicksburg, S. & P. Rd. Co. v. Anderson-Tully Co.*, *supra*). Of course, we do not mean to say that the fact that the railway might have been sued would make it liable for the acts of the Director General of Railroads; that was a matter of defense and did not go to the jurisdiction of the court.

(3, 4) There was evidence tending to show that one Williamson, who was a claim agent and attorney employed by both the Director General and the Wabash Railway Company, made the settlement with the administratrix. The contract of settlement was in the form of a release, and recited that the money was paid by the Director General. However, the voucher for the money was signed by "Wabash R. R., Federal Account." The release stipulates that both the Director General and the railway company were released. Williamson, as attorney for the Wabash, filed a stipulation in the original cause of Bessie G. Welker, administratrix of the estate of Mern G. Welker, deceased, *versus* Wabash Railway Company, reciting that the subject-matter of the suit had been fully settled, and stipulating that the suit should be dismissed, at defendant's costs. This stipulation for dismissal was signed by the Wabash Railway Company, by Williamson, as counsel. The evidence shows that Williamson before he settled with the administratrix knew of Elliott's contract with her.

As the settlement was made after suit was brought, no notice of Elliott's lien was required. *Taylor v. Railroad*, 207 Mo. 495, 105 S. W. 740. Appellant is in no position to say that it did not make settlement with the administratrix in view of the fact that it accepted its benefits by filing the stipulation of dismissal. *Wilson v. St. Joseph & G. I. Ry. Co.*, 211 S. W. 897; *Reed v. John Gill & Sons Co.*, 201 Mo. App. 457, 459, 212 S. W. 43.

(5) In reference to the contention that, under Federal Order No. 50 of the Director General of Railroads, the original suit of the administratrix against the Wabash Railway Company was improperly brought against the railway company, instead of against the Director General, there is much conflict of authority as to whether said order is effective to require suits to be brought against the Director General, some cases holding that they must be brought in that manner on the ground that the railway company cannot be held liable for the acts or neglect of his servants or/and agents, but not on the ground that the Director General can deprive the courts of jurisdiction to determine whether the railway company in suits against it can be held for the acts or neglect of the servants and agents of the Director General. In other words, the question of whether the railway company or the Director General can be sued for the acts and conduct of the latter's servants and agents is not a jurisdictional question, but the courts still retain jurisdiction to try such a suit on the merits and to determine if the Federal Control Act, together with General Order No. 50, is or is not a matter in bar to the

merits of the action. In this connection it will be noted that the reason assigned in General Order No. 50 for its issuance was that—

“\* \* \* Suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during federal control for which the said carrier corporations are not responsible.”

The order in effect declares “carriers” not responsible for the conduct of the Director General and his agents. We will hereafter point out that the Director General has no right to issue orders limiting the jurisdiction of the courts. The courts still may lawfully issue and have served process to bring the railway company into court, even though the petition bases the cause of action on the negligence of the servants of the Director General. However, there are many cases holding that the federal statute, *supra*, provides for the suing of the carrier corporation itself. The cases pro and con are collated in the case of *Hines v. Dahn, supra*.

As before stated, there is nothing in the federal statute or order of the Director General of Railroads preventing or assuming to prevent the suing of the carrier as a corporation. The order does not prevent its suing or the being sued. The Supreme Court of this state in the case of *Hite v. St. Joseph & G. I. Ry. Co., supra*, held that the federal statute *supra* provides for the operation of railroads by the companies themselves, but under federal control, and that an employee could maintain an action against the railroad company even though at the time of his injury the railroad was under federal con-

trol. This suit was brought before the promulgation of General Order No. 50, and we do not know what the Supreme Court of the state would hold in a case brought after October 28, 1918.

(6) However, we find it unnecessary to go into the question as to whether a recovery can be had against the railway corporation for the acts of the Director General in violation of the Federal Control Act and his order No. 50, as the facts in this case show that the administratrix had at least a bona fide dispute or doubtful claim against the railway company as such. This is shown by the fact that the courts themselves do not fully agree as to whether the suit may not be successfully prosecuted against the railway company instead of the Director General of Railroads. There is no contention that the administratrix did not have a good cause of action from the standpoint of negligent conduct of one or the other, nor is there any question but that the claim was asserted in good faith. These facts, together with the further fact that a suit was pending at the time of the compromise, show that there was a sufficient consideration for the settlement. 12 C. J. pp. 324, 326, 327; *Livingston v. Dugan*, 20 Mo. 102; *Wood v. Telephone Co.*, 223 Mo. 537, 565, 123 S. W. 6. There was not only sufficient consideration for the settlement, but the amount of money under the agreement to settle was actually paid and received by the administratrix. In view of all of these facts it is not incumbent upon Elliott, in order to recover, to show that the claim was a valid one in the sense that the claimant be able to recover on it. 12 C. J. pp. 329, 330. This renders it unnecessary

for us to hold that the railway company is estopped to claim lack of consideration for the settlement by its conduct in accepting the fruits thereof after the amount of the settlement was paid the administratrix. From what we have said we think there is no question but that Elliott is entitled to recover, and that the court did not err in giving Elliott's declarations of law Nos. 3, 4 and 7 and in refusing defendant's declarations of law Nos. 4, 5, 6, 7, 9, and 13.

(7, 8) It is insisted that, if Elliott was entitled to recover, his recovery should be for only 50 per cent of the amount actually paid in settlement of the claim—that is, 50 per cent of \$4,162.85—and for that reason the court erred in giving his declaration No. 2 and refusing defendant's declaration No. 3. There was evidence tending to show that Williamson said to the administratrix, in making the settlement, that the part he paid to her was hers; to put the money in the bank; to use the money as her own; and that she would not have to divide the money with her lawyers. While there was some evidence contradicting this, the finding of the trial court, sitting as a jury, on this conflict in the evidence is conclusive on us. *Mytton v. Mo. Pac. Ry. Co.*, 211 S. W. 111. In view of this evidence the amount of settlement was not the amount of money actually paid the administratrix, but the agreement was that the amount paid to the administratrix was only her part under the attorney's contract, and not the attorney's portion. As under the contract she had with Elliott her share was to be only 50 per cent of the whole sum, the total settlement was for twice the amount she received. There-

fore Elliott was entitled to recover one-half of the whole settlement, which is a sum equal to that paid his client. *Mytton v. N. Y. Central & St. L. R. Co.*, 198 S. W. 189; *Mylton v. Mo. Pac. Ry. Co.*, *supra*; *Kacmmerer v. St. Louis Elec. Ry. Co.*, 201 Mo. App. 305, 211 S. W. 687; *Boyd v. Chase & Sons Mercantile Co.*, 135 Mo. App. 115, 115 S. W. 1052; *Curtis v. Met.*, 125 Mo. App. 369, 102 S. W. 62; *Curtis v. Met.*, 118 Mo. App. 341, 94 S. W. 762.

(9) It is insisted that by reason of General order Nos. 18 and 18a promulgated by the Director General of Railroads, providing that suits against carriers must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose, the Circuit Court of Livingston County had no jurisdiction, as the plaintiff resided in Shelby County and the cause of action arose in Iowa. The venue in transitory causes of action provided by the laws of the state could not be modified or limited by orders of the Director General, as was attempted in General Orders 18 and 18a. *State v. Calhoun*, 281 Mo. 583, 220 S. W. 6; *Hanbert v. Baltimore & Ohio R. Co.* (D. C.), 259 Fed. 361, 363; *Moore v. Atchison, T. & S. F. Ry. Co.*, 106 Misc. Rep. 58, 174 N. Y. Supp. 60; *Illinois Central R. Co. v. Ryan* (Tex. Civ. App.), 214 S. W. 642; *El Paso & S. W. R. Co. v. Lovick* (Tex. Civ. App.), 210 S. W. 283; *Pullman Co. v. Uribe* (Tex. Civ. App.), 225 S. W. 189; *Young v. Hines*, 229 S. W. 417, decided by this court, but not yet (officially) reported.

The judgment is affirmed.

All concur.

The opinion of the Court of Appeals on motion for rehearing is as follows:

"Since the foregoing opinion was handed down, the case of *Adams v. Q., O. & K. C. R. Co.*, has been published in 229 S. W. 790, and in its motion for a rehearing defendant contends that our decision is in conflict with that one of the Supreme Court. That decision holds that the railroad company is not liable for the acts of those employed in the railroad service during federal control. On the original submission of this case we said:

'This suit (*Hite v. Ry.*, 225 S. W. 916) was brought before the promulgation of General Order No. 50, and we do not know what the Supreme Court of this state would hold in a case brought after October 28, 1918.'

The Supreme Court has answered this in the *Adams* case. However, we were careful in the opinion to say, 'We find it unnecessary to go into the question as to whether a recovery can be had against the railway corporation for the acts of the Director General,' and placed our decision on the proposition that it was not necessary that there could be such a recovery, but, as Mrs. Welker had a *bona fide* doubtful claim against the railway corporation, and that corporation settled it with her while the suit was pending against it, there was a sufficient consideration for the settlement and the settlement was paid, and that, consequently, it was unnecessary for Elliott to show his client's claim was a valid one in the sense that the claimant be able to recover on it.

The fact that the claim was at least a doubtful one when the settlement was made is shown by the cases of *Hite v. Ry.*, *supra*; *Postal Telegraph Co. v. Call*, 255 Fed. 850,

167 C. C. A. 178; *Jenson v. L. V. R. Co.* (D. C.) 255 Fed. 795; *Johnson v. McAdoo* (D. C.) 257 Fed. 757; *Witherspoon v. Postal, etc. Co.* (D. C.), 257 Fed. 758; *The Catawissa* (D. C.), 257 Fed. 863; *Dampskibs v. Hustis* (D. C.) 257 Fed. 862; *Lavalle v. N. P. R. Co.*, 143 Minn. 74, 172 N. W. 918, 4 A. L. R. 1659; *Gowan v. McAdoo*, 143 Minn. 227, 173 N. W. 440; *Paylo v. N. P. R. Co.*, 144 Minn. 398, 175 N. W. 687; *Ringquist v. M. & N. R. Co.*, 145 Minn. 147, 176 N. W. 344; *McGregor v. G. N. R. Co.*, 42 N. D. 269, 172 N. W. 841, 4 A. L. R. 1635; *Franke v. C. & N. W. R. Co.*, 170 Wis. 71, 173 N. W. 701; *M. P. R. Co. v. Ault*, 140 Ark. 572, 216 S. W. 3; *Lancaster v. Keebler* (Tex. Civ. App.) 217 S. W. 1117; *Clapp v. Amer. Ex. Co.*, 234 Mass. 174, 125 N. E. 162; *Owens v. Hines*, 178 N. C. 325, 100 S. E. 617.

With the concurrence of ARNOLD, J., the motion for a rehearing is overruled; and it is so ordered."

It appears, therefore, that the statement of the case set forth in the petition for the writ is not exactly in accordance with the facts as set forth in the opinion of the Court of Appeals.

Two reasons are advanced by the petitioner in support of the proposition that the judgment should be brought here for review: First, that the judgment and decision of the Kansas City Court of Appeals is directly in conflict with the decision of this court made on June 1, 1921, in the case of *Missouri Pacific v. Ault*, where, among other things, it was held that the railroad corporations were not liable for the acts or omissions

of the Director General in operating the railroads under the Federal Control Act.

The original opinion of the Court of Appeals, as well as the opinion on the motion for rehearing, demonstrates that the liability of the defendant corporation was not based upon any act or omission of the Director General, but was based upon its own act in entering its appearance and in filing a stipulation to dismiss a suit filed against it in good faith and upon a cause of action which the Supreme Court of Missouri and the courts of many other states, as well as the Federal courts, had held was valid, which stipulation recited that defendant corporation had settled same and was taking advantage of settlement made for its benefit, and dismissing the suit.

This is shown by the opinion wherein it is said:

"We find it unnecessary to go into the question as to whether a recovery can be had against the railway corporation for the acts of the Director General in view of the Federal Control Act and his order No. 50, as the facts in this case show that the administratrix had at least a *bona fide* dispute or doubtful claim against the railway company as such. This is shown by the fact that the courts themselves do not fully agree as to whether the suit may not be successfully prosecuted against the railway company instead of the Director General of railroads. There is no contention that the administratrix did not have a good cause of action from the standpoint of negligent conduct of one or the other, nor is there any question but that the claim was asserted in good faith. These facts, to-

gether with the further fact that a suit was pending at the time of the compromise, show that there was a sufficient consideration for the settlement. 12 C. J. pp. 324, 326, 327; *Livingston v. Dugan*, 20 Mo. 102; *Wood v. Telephone Co.*, 223 Mo. 537, 565, 123 S. W. 6. There was not only sufficient consideration for the settlement, but the amount of money under the agreement to settle was actually paid and received by the administratrix. In view of all of these facts it is not incumbent upon Elliott, in order to recover, to show that the claim was a valid one in the sense that claimant be able to recover on it. 12 C. J. pp. 329, 330. This renders it unnecessary for us to hold that the railway company is estopped to claim lack of consideration for the settlement by its conduct in accepting the fruits thereof after the amount of the settlement was paid the administratrix. From what we have said we think there is no question but that Elliott is entitled to recover."

On rehearing the Court of Appeals had before it the identical question presented to this court in the petition, and had before it all the authorities, together with the decision of the Supreme Court of Missouri in *Adams v. Railway Co.*, 229 S. W. 790, where the Supreme Court of that state holds that the railway company is not liable for the acts of those employed in the railroad service during federal control. The Court of Appeals in the opinion herein recognizes that this is the law, and expressly says on motion for rehearing:

"We were careful in the opinion to say, 'We find it unnecessary to go into the ques-

tion as to whether a recovery can be had against the railway corporation for the acts of the Director General,' and placed our decision on the proposition that it was not necessary that there could be such a recovery, but, as Mrs. Welker had a bona fide doubtful claim against the railway corporation, and that corporation settled it with her while the suit was pending against it, there was a sufficient consideration for the settlement and the settlement was paid, and that, consequently, it was unnecessary for Elliott to show his client's claim was a valid one in the sense that the claimant be able to recover on it.

The fact that the claim was at least a doubtful one when the settlement was made is shown by the cases of *Hite v. Ry.*, *supra*; *Postal Telegraph Co. v. Call*, 255 Fed. 850, 167 C. C. A. 178; *Jensen v. L. V. R. Co.* (D. C.), 255 Fed. 795; *Johnson v. McAdoo* (D. C.), 257 Fed. 757; *Witherspoon v. Postal, etc., Co.* (D. C.), 257 Fed. 758; *The Catawissa* (D. C.), 257 Fed. 863; *Dampskibs v. Hustis* (D. C.), 257 Fed. 862; *Lavalle v. N. P. R. Co.*, 143 Minn. 74, 172 N. W. 918, 4 A. L. R. 1659; *Gowan v. McAdoo*, 143 Minn. 227, 173 N. W. 440; *Paylo v. N. P. R. Co.*, 144 Minn. 398, 175 N. W. 687; *Ringquist v. M. & N. R. Co.*, 145 Minn. 147, 176 N. W. 344; *McGregor v. G. N. R. Co.*, 42 N. D. 269, 172 N. W. 841, 4 A. L. R. 1635; *Franke v. C. & N. W. R. Co.*, 170 Wis. 71, 173 N. W. 701; *M. P. R. Co. v. Ault*, 140 Ark. 572, 216 S. W. 3; *Lancaster v. Keebler* (Tex. Civ. App.), 217 S. W. 1117; *Clapp v. Amer. Ex. Co.*, 234 Mass. 174, 125 N. E. 162; *Owens v. Hines*, 78 N. C. 325, 100 S. E. 617."

Afterwards the petitioner herein presented a petition for writ of certiorari to the Supreme Court of Missouri and that court denied the petition for the writ, holding there was no conflict in the decision of the Court of Appeals and the decision of the Supreme Court in the Adams case, which is exactly the holding of this court in the Ault case. This court will observe that the Transportation Act of 1920, mentioned in the Adams case by the Supreme Court of Missouri, authorized the substitution of the agent of the President for the carriers, and that the petitioner did not avail itself of the right, if any, it had to substitute said agent.

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Three well defined reasons stand in the way of granting the writ of certiorari:

I. Absence of a federal question.

II. The decision of the Kansas City Court of Appeals rests on an independent principle of non-federal law.

III. Clear and palpable error on the part of the state court does not appear.

### I.

It is essential to the jurisdiction of this court that it shall appear that a federal question is involved; that it was raised in and presented to the state court and that the decision was against the right claimed; that the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case; or that there has been no decision by the state court of any other matter or issue sufficient to maintain the judgment of that court without regard to the federal question.

*Murdock v. Memphis*, 20 Wall. 590-642.

The existence of jurisdiction to review under these principles depends not merely upon form, but upon substance.

*Seaboard Air Line v. Padgett*, 236 U. S. 671.

To express it more clearly we quote from *Western Union Teleg. Co. v. Wilson*, 213 U. S. 52, on page 53:

"This case comes here from a state court, and, of course, therefore it must appear that a federal question necessarily was involved in the decision before this court can take jurisdiction or undertake to reverse the judgment of a tribunal over which it has no general power. It is not enough that a right under the Constitution of the United States was specially set up and claimed. It must be made manifest either that the right was denied in fact, or that the judgment could not have been rendered without denying it. *De-Saussure v. Gaillard*, 127 U. S. 216; *Johnson v. Risk*, 137 U. S. 300; *Leathe v. Thomas*, 207 U. S. 93, 99; see also *Batchel v. Wilson*, 204 U. S. 36."

## II.

**The decision of the Kansas City Court of Appeals is based upon an independent principle of general law which eliminates liability upon the part of the defendant for the acts of the Director General of Railroads, thus excluding a federal question. Therefore, the consideration of a federal question was not necessary to the court's decision.**

Petitioner does not gainsay this proposition, but claims that the Kansas City Court of Appeals missed the point at issue. We think that it hit the point at issue, but it makes no difference whether it did or not. Its decision in the case

was a decision on a non-federal question and this court will not review it. That is to say, its decision was upon the question: When a suit is pending, and is asserted in good faith, in a court of general jurisdiction, against a defendant who appears in that court, and that defendant makes a settlement of the claim and files a stipulation to dismiss the suit, does the settlement of the claim and the stipulation to dismiss, make it liable under the general principles of law? Certainly, this is not a federal question. As was said in the case of *Murdock v. Memphis*, 20 Wall. 642, l. c. 638:

"The claim of right here set up is one to be determined by the general principles of equity jurisprudence, and is unaffected by anything found in the Constitution, laws, or treaties of the United States. *Whether decided well or otherwise by the State Court, we have no authority to inquire.*"

The Kansas City Court of Appeals had the right to apply the general principles of law enunciated by the Supreme Court of the state in *Livingston v. Dugan*, 20 Mo. 102; *Wood v. Telephone Co.*, 223 Mo. 537; 12 C. J., 324, 326, 327.

This court, in the following cases, has expressly recognized the application of the principle that the settlement of a *bona fide* dispute or doubtful claim is binding upon the parties and the courts, and that when a trial court refuses to give effect to such settlement, as did the Kansas City Court of Appeals give effect herein, it fails to

give effect to a controlling principle of general law.

*San Juan v. St. John's Gas Co.*, 195 U. S. 510.

*Fire Ins. Assn., Ltd., v. Wickham*, 141 U. S. 564.

*Hennessy v. Bacon*, 137 U. S. 78.

*Bofinger v. Tuyes*, 120 U. S. 198.

*Northern Liberty Market Co. v. Kelly*, 113 U. S. 199.

*Jeffries v. New York Mut. L. Ins. Co.*, 110 U. S. 305.

*St. Louis v. U. S.*, 92 U. S. 462.

*U. S. v. Child*, 12 Wall. 232.

*Union Bank v. Geary*, 5 Pet. 99.

Though on a general principle of non-federal law, we would add that the dissenting opinion of Judge Trimble, of the Kansas City Court of Appeals, which petitioner quotes at length, utterly ignores the fact that upon the disputed issue as to who made the settlement, the trial court, sitting as a jury, found that the settlement was in fact made by defendant Wabash Railway Company. There is no principle more firmly established by the courts of Missouri than that the finding of the trial court on disputed questions of fact is binding on, and cannot be disturbed by, the appellate courts. Cases without number so holding could be cited, but we will content ourselves with the citation of only a few of the recent authorities:

*Quisenberry v. Stewart*, 219 S. W. 625.

*Webster v. Webster's Estate*, 189 S. W. 608;

*Shelton v. Railway*, 190 S. W. 46.

*Russell Grain Co. v. Bainter*, 223 S. W. 769.

To show that the trial court had before it substantial evidence on which to base its finding, approved by the Missouri appellate courts, that defendant Wabash Railway Company made the settlement, we have only to quote the stipulation signed and filed by such defendant (see Petitioner's Abstract of Record, p. 53):

"In the Circuit Court of Livingston County, Missouri. To the . . . . . Term, 1918.

Bessie G. Welker, Administratrix,

Estate of Mern G. Welker, deceased,

vs.

Wabash Railway Company.

The subject matter of the above entitled suit having been fully settled between the parties hereto, it is hereby stipulated and agreed that said suit be dismissed at defendant's cost.

(Signed) BESSIE G. WELKER,  
Administratrix, etc., Plaintiff.  
WABASH RAILWAY COMPANY,  
Defendant.

By C. G. WILLIAMSON, Its C—."

Bearing in mind that at the time this stipulation was signed and filed by the Wabash Railway Company, it and the plaintiff administratrix were the only parties to the suit, the recitation of the "suit having been fully settled between the parties hereto," is and can be nothing but the written, signed statement of the Wabash Railway Com-

pany that it had made the settlement. Men have been convicted of grave crimes on statements far less solemn.

It is immaterial that the decision of this court in *Mo. Pac. R. R. Co. v. Ault*, or the decision of the Supreme Court of Missouri in the Adams case rendered long after the settlement was made, shows the rights of the parties to have been different from what they at the time supposed. *Hennessey v. Bacon*, 137 U. S. 78; *Mills County v. Burlington Ry. Co.*, 107 U. S. 557. In other words, it is not necessary to sustain a compromise of a doubtful right that the parties shall have settled the controversy as the law would have done. It is sufficient to support a compromise that there be an actual controversy between the parties of which the issue fairly may be considered by both parties as doubtful and that at the time of the compromise they, in good faith, so considered it. *Kiefer Oil Co. v. McDougal*, 229 Fed. 933; *Long v. Towel*, 42 Mo. 545.

To sustain the contention of the petitioner, this court would find it necessary to overturn the well established principles of general law recognized by this court and the Supreme Court of Missouri and applied by the Kansas City Court of Appeals. For the reasons given the writ should be denied.

GEORGE H. KELLY,  
WM. BUCHHOLZ,  
I. B. KIMBRELL,  
MARTIN J. O'DONNELL,  
*Counsel for Respondent.*

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Opinion of the Court.

WABASH RAILWAY COMPANY *v.* ELLIOTT.

CERTIORARI TO THE KANSAS CITY COURT OF APPEALS, STATE OF MISSOURI.

No. 225. Argued January 16, 1923.—Decided April 9, 1923.

Where a claim for personal injuries occasioned by the operation of a railroad while in the exclusive possession and control of the United States acting through the Director General of Railroads, was compromised and settled between that official and the claimant without participation by the railway company, an attorney who had contracted with the claimant to compromise or enforce the claim for a percentage of the recovery, and who did not consent to the settlement, had no cause of action under a state lien statute (Rev. Stats. Mo., 1919, § 691) against the railway company. P. 460.

208 Mo. App. 348, reversed.

CERTIORARI to a judgment of the Kansas City Court of Appeals affirming a judgment against the Railway Company, in an action to enforce an attorney's statutory lien.

*Mr. Frederic D. McKenney*, with whom *Mr. N. S. Brown* was on the brief, for petitioner.

*Mr. Martin J. O'Donnell*, with whom *Mr. George H. Kelly*, *Mr. Wm. Buchholz* and *Mr. Isaac B. Kimbrell* were on the brief, for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

On April 2, 1918, while the railroad of the Wabash Railway Company was in the possession of the United States and operated by the Director General of Railroads, Mern G. Welker, a brakeman on that railroad, was fatally injured and died in circumstances which, under the Employers' Liability Acts of Congress, probably would have made the railway company liable in damages for his

injury and death had the company been operating the railroad at the time. His widow became the administratrix of his estate and as such entered into a contract with Miles Elliott, an attorney at law, under which the latter was to investigate the claim for the injury and death, compromise the same, or enforce it by suit, and have for his service fifty per cent. of all moneys received. Elliott caused a notice, addressed to the railway company and reciting the substance of the contract, to be served on one Stepp, who was the station agent of the Director General at Chillicothe, Missouri. The contract was made and the notice given under a statute of Missouri (§ 691, R. S. 1919) which provides that such a contract shall, after the service of notice, give the attorney a lien on the claim and the proceeds for his portion or percentage, and that—

“any defendant or defendants, or proposed defendant or defendants, who shall, after notice served as herein provided, in any manner, settle any claim, suit, cause of action, or action at law with such attorney’s client, before or after litigation instituted thereon, without first procuring the written consent of such attorney, shall be liable to such attorney for such attorney’s lien as aforesaid upon the proceeds of such settlement, . . .”

June 5, 1918, Elliott commenced an action by the administratrix against the railway company in the circuit court of Livingston County, Missouri, to enforce the claim. Before there was any appearance by the railway company in that case, the Director General, acting through a claim agent in his employ, compromised the claim with the administratrix, paid to her \$4,000 from the funds of the United States Railroad Administration and received from her a written instrument acknowledging the receipt of that sum from him and releasing him and the railway company from all claims and demands by reason of Welker’s injury and death. The Director General also paid to her from the same funds the further sum of

\$162.85 to cover funeral and burial expenses. As part of the compromise and settlement the administratrix and the claim agent acting for the Director General entered into a stipulation bearing the title of the action against the railway company, reciting that the subject-matter of the action had been fully settled between the parties and consenting that the action be dismissed at defendant's costs. This stipulation was presented and filed in the circuit court by counsel acting for the Director General. The settlement and the stipulation for a dismissal were without the consent of Elliott and no part of the sum paid to the administratrix was paid by her to him.

January 11, 1919, Elliott began a proceeding against the railway company in the circuit court of Livingston County, where the action of the administratrix was pending, to enforce a lien under his contract and the state statute. In his petition he set forth the matters before stated, save that instead of recognizing the federal control and operation of the railroad, he directly charged the railway company with all that was done by the Director General and the representatives, agents and employees of the latter; and he alleged that as part of the compromise and settlement the company promised the administratrix to pay to him, as his compensation or percentage under the contract, the same amount that was paid to her. His prayer was that his lien be enforced by awarding him a judgment against the company for that sum. In an amended petition he made the Director General a party, charged both the railway company and the Director General with what he had before charged against the company alone and prayed judgment against both.

Separate answers were filed, but that of the Director General need not be noticed. The company's answer set up, among other things, (1) that the federal possession, control and operation of the railroad covered all the dates named in the petition and there was no possession or

operation by the company during that period; (2) that the acts charged against the company in the petition, in so far as they had any reality, were solely the acts of representatives, employees and agents of the Director General; and (3) that the suit of the administratrix and the proceeding by Elliott could not be maintained against the company but only against the Director General. As showing the nature of the federal control and the company's freedom from liability for acts or omissions in the course of such control, the answer directed attention to and invoked the application of the acts of Congress, proclamations of the President and orders of the Director General according to which that control was exercised.

On the trial the court found the issues between Elliott and the railway company in favor of the former and those between Elliott and the Director General in favor of the latter. Judgment was then entered that Elliott recover \$4,162.85 from the company and nothing from the Director General. The company appealed to the Kansas City Court of Appeals and it affirmed the judgment. 208 Mo. App. 348. That court refused to transfer the case to the Supreme Court of the State and the latter denied a petition asking it to review the judgment on writ of certiorari. After the avenues of review within the State were thus exhausted this Court granted a petition for a writ of certiorari to the Kansas City Court of Appeals to bring the case here.

Complaint is made of several rulings, but only one need be considered. Conformably to the local practice the railway company, at the close of the evidence, requested the court to declare that there was no evidence to sustain a finding against it, and therefore the finding and judgment should be in its favor. This request was based in part on what the company claimed was the right construction and application of the congressional enactments, presidential proclamations, and orders of the Director

General relied on in its answer. The request was refused. We think it plainly should have been granted.

Affirmatively and without contradiction the evidence established that at the time of Welker's injury and death and continually until after Elliott's proceeding was begun the company's railroad was in the exclusive possession and control of the United States and operated by the Director General of Railroads; that Welker's injury and death were not caused by any act or omission of the company or anyone in its employ, and that the company had nothing to do with the compromise and settlement with the administratrix and did not promise to pay her attorney. The courts below apparently assumed that the claim agent who effected the compromise and settlement represented the company as well as the Director General; but the assumption was wholly inadmissible. The evidence was directly and positively to the contrary. The claim agent had been in the company's service prior to the federal control, but during that control was only in the service of the Director General. The payment to the administratrix was made by a check drawn by the Director General on funds of the United States Railroad Administration and the receipt taken from her recited that the payment was by the Director General. Indeed, so far as appeared, the company did not know of the compromise and settlement until after Elliott's proceeding was begun. In all the evidence there were but two matters which, even if separated from the rest, could give any color to what was assumed below. One was the inclusion of the company in the release. But this was explained consistently with the other evidence by an accompanying recital that the sum received by the administratrix from the Director General was the sole consideration for the release, and by the fact that in the circumstances simple justice to the company would suggest its inclusion in the

release. The other matter was that the claim agent signed the stipulation for a dismissal of the pending suit as attorney for the company. But this was made quite negligible by direct evidence that the claim agent had no authority to act or speak for the company and by the fact that the Director General, during whose operation the claim arose and for whom the claim agent was acting, was free to have himself substituted as a party in the company's place and to assume the defense of that suit. See *Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554.

To sustain its asserted freedom from liability in such circumstances the company relied particularly<sup>1</sup> on § 10 of the Federal Control Act of March 21, 1918, c. 25, 40 Stat. 451, and General Order No. 50 by the Director General of Railroads, U. S. R. R. Administration Bulletin No. 4 (Revised), p. 334. That statute and order were considered at length in *Missouri Pacific R. R. Co. v. Ault*, *supra*, and were there construed as contemplating and intending that rights of action arising out of acts or omissions occurring in the course of the federal control of a railroad should be against the Director General and not the company owning the road. That decision was followed and applied in *North Carolina R. R. Co. v. Lee*, 260 U. S. 16, and its principle was recognized in *Alabama & Vicksburg Ry. Co. v. Journey*, 257 U. S. 111, and *Davis v. L. N. Dantzler Lumber Co.*, *ante*, 280.

Thus whatever claim the administratrix had for Welker's injury and death was against the Director General, not the company. Elliott's lien, if he had one, was on that claim. The settlement of the claim was strictly an

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<sup>1</sup> It also relied incidentally on the Act of August 29, 1916, c. 418, 39 Stat. 619, 645; the President's Proclamation of December 26, 1917, 40 Stat. 1733; General Orders Nos. 18, 18a and 26 by the Director General of Railroads, U. S. R. R. Administration Bulletin No. 4 (Revised), pp. 186, 187, 196, and § 206 of the Transportation Act of February 28, 1920, c. 91, 41 Stat. 456.

act of the Director General done in the course of the federal control. No liability could attach to the company for that act consistently with the federal statute and order just cited. Whether the particular liability defined in the state statute before quoted was of such a nature that it could be applied to the Director General we need not consider, for there was no appeal from the judgment of the circuit court in his favor. See *Missouri Pacific R. R. Co. v. Ault*, pp. 563, *et seq.*; *Norfolk-Southern R. R. Co. v. Owens*, 256 U. S. 565.

*Judgment reversed.*